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In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, PETITIONER

v.

FELIX HUMBERTO BRIGNONI-PONCE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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FELIX HUMBERTO BRIGNONI-PONCE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra,* pp. 1a–6a) is not yet reported.

JURISDICTION

The *en banc* judgment of the court of appeals (App. B, *infra,* p. 7a) was entered on June 14, 1974. On July 10, 1974, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including August 13, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the warrantless stop of an automobile by Border Patrol officers, acting pursuant to their statutory authority to question persons in the vehicle whom they believe to be aliens concerning their right to be or remain in the United States, violates the Fourth Amendment's proscription against unreasonable searches and seizures and requires the suppression of evidence obtained as a result of the stop but without any subsequent search.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

1. The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. Section 287(a) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1357(a), provides in pertinent part:

> Any officer or employee of the [Immigration and Naturalization] Service authorized under regulations prescribed by the Attorney General shall have power without warrant—
>
> (1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States;
>
> * * * * *
>
> (3) within a reasonable distance from any external boundary of the United States, to board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle, and within a distance of twenty-five miles from any such external boundary to have access to private lands, but not dwellings, for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States; * * *.

STATEMENT

After a jury trial in the United States District Court for the Southern District of California, respondent was convicted on two counts of transporting aliens who were present in this country illegally, in violation of 8 U.S.C. 1324(a)(2). He was sentenced to four years' imprisonment on count 1, subject to the immediate parole eligibility provisions of 18 U.S.C. 4208(a)(2), and five years' probation on count 2.

1. The evidence at trial established that on March 11, 1973, Border Patrol Agents Brady and Harkins were on duty in a patrol car observing northbound traffic on Interstate Highway 5 approximately four miles south of San Clemente, California (Tr. 15–16).[1]

[1] The officers were parked off the highway at the site of a permanent immigration checkpoint which was closed because of inclement weather (Tr. 16–18). The patrol car was parked at a 90-degree angle to the highway with its headlights on (Tr. 22). The officers were able to see the occupants of passing vehicles (*ibid.*). A description of the San Clemente checkpoint and its normal mode of operation is set forth in *United States* v. *Baca*, 368 F. Supp. 398, 410–411 (S.D. Cal.). The checkpoint is located approximately 62 air miles and 66 road miles north of the Mexican border (*id.* at 410).

During the early evening hours, they observed traveling north a vehicle driven by respondent and containing two passengers (Tr. 18–19, 20–22). The officers pursued and stopped the car for a "routine immigration inspection" (Tr. 19, 21–22) because they observed that its three occupants appeared to be of Mexican descent (Tr. 22–23).

Upon questioning the passengers in the vehicle in English and Spanish concerning their citizenship, the officers discovered that they spoke no English and had no papers authorizing them to be in the United States (Tr. 19–20). Respondent and the passengers were then arrested (Tr. 21). At trial, both passengers testified that they are Mexican citizens who had entered the United States illegally (Tr. 24–25, 57, 63–64).

The parties agreed by stipulation that respondent's motion to suppress the evidence derived from the stop of his vehicle could be heard and decided at the time of trial (Clerk's record on appeal, p. 35). The district court denied the motion (*ibid.*).

2. Subsequent to respondent's trial, this Court decided *Almeida-Sanchez* v. *United States,* 413 U.S. 266, which held that a warrantless roving patrol *search* of an automobile for concealed aliens, conducted by Border Patrol officers acting without probable cause or reasonable suspicion to believe that the vehicle contained any aliens present in this country unlawfully, violated the Fourth Amendment's proscription against unreasonable searches and seizures. The Ninth Circuit subsequently held that the ruling in *Almeida-Sanchez* should be applied retroactively to require the

exclusion of evidence seized in similar roving patrol searches conducted prior to the date of this Court's decision. *United States* v. *Peltier,* C.A. 9, No. 73–2509, decided May 9, 1974, pending on the government's petition for a writ of certiorari, No. 73–2000. It also held, however, that *Almeida-Sanchez* should apply only prospectively with respect to searches conducted at fixed immigration checkpoints. *United States* v. *Bowen,* C.A. 9, No. 72–1012, decided May 9, 19774, pending on the defendant's petition for a writ of certiorari, No. 73–6848.[2]

In the present case, the court of appeals, sitting *en banc,* reversed respondent's conviction (App. A, *infra,* pp. 1a–6a). It held first that the Border Patrol officers' conduct in pursuing respondent's vehicle and flagging it to the side of the road was "more characteristic of a roving-patrol stop than of a fixed-checkpoint stop" (*id.* at 3a). Therefore, under the court of appeals' decision in *Peltier,* the principles of *Almeida-Sanchez* apply even though the stop occurred prior to the date of this Court's decision in that case (*id.* at 2a–3a).

---

[2] The Ninth Circuit had first held in *Bowen* that *Almeida-Sanchez* should be extended to invalidate warrantless, non-probable-cause searches of automobiles for aliens at fixed checkpoints. That ruling was later applied in a case involving a post-*Almeida-Sanchez* checkpoint search (*United States* v. *Ortiz,* C.A. 9, No. 74–1249, decided June 19, 1974). We have filed a petition for a writ of certiorari in *Ortiz* (No. 73–2050), in which we argue that warrants are not required for checkpoint searches of vehicles for concealed aliens and that, even if warrants are required, the ruling should not apply to checkpoint searches that occurred prior to the court of appeals' decision in *Bowen.*

The court next held that warrantless *stops* of vehicles, "without probable cause, and without even a reasonable suspicion that any of the occupants are illegal aliens [,] * * * are entirely inconsistent with the Supreme Court's opinion in *Almeida-Sanchez*" (*id.* at 3a–4a). The court of appeals acknowledged that *Almeida-Sanchez* involved a search rather than only a stop and that 8 U.S.C. 1357(a) gives Border Patrol officers authority not only to search vehicles for concealed aliens without a warrant but also "to interrogate any alien or person believed to be an alien as to his right to be or remain in the United States * * *." The court held, however, that this Court's opinion in *Almeida-Sanchez* "reflects at least as much concern with the initial stop as with the subsequent search" (App. A, *infra,* p. 4a).

The court concluded that a warrantless stop of a vehicle is permissible only if the officers have information that constitutes "a founded suspicion" that one or more occupants of the vehicle are aliens whose presence in this country is unlawful (*id.* at 6a). Although not disputing that the officers here had reason to believe that respondent and his passengers were aliens, the court held that they did not have a founded suspicion that the vehicle's occupants were present in this country *unlawfully*. It therefore concluded that "the stop and interrogation * * * were illegal, and the fruits of the illegal conduct were inadmissible" (*ibid.*).

The court refused to "adopt the approach taken by our brothers on the Tenth Circuit" (*id.* at 3a) in *United States* v. *Bowman,* 487 F. 2d 1229, in which that court held that the stopping of an automobile "for

the limited purpose of determining [the driver's] citizenship was entirely justified" under 8 U.S.C. 1357(a)(1) and is not barred by the Fourth Amendment or by the principles of *Almeida-Sanchez* (487 F. 2d at 1231).

REASONS FOR GRANTING THE WRIT

This case presents an important issue concerning the Border Patrol's authority, consistent with the Fourth Amendment, to employ a law enforcement method that has a significant role in the Border Patrol's program of deterring and detecting the unlawful entry and transportation of aliens in this country. That issue—which this Court did not decide in *Almeida-Sanchez* and on which the courts of appeals have reached inconsistent results—is whether the Border Patrol may, without a warrant, briefly stop a vehicle to question its occupants about their right to be in this country, when the officers know or reasonably believe that the occupants may be aliens.[3]

[3] In our petition for a writ of certiorari in *United States* v. *Peltier*, No. 73–2000, we argue that *Almeida-Sanchez* should not be applied retroactively to exclude evidence discovered as a result of a warrantless roving patrol stop and search conducted prior to this Court's decision. If the Court grants our petition and agrees with our contention in *Peltier*, that decision might provide a ground upon which the judgment in the present case could be reversed, since the stop of respondent's automobile occurred prior to the decision in *Almeida-Sanchez*. If the exclusionary rule is inapplicable in the case of a pre-*Almeida-Sanchez* stop and search, it is presumably inapplicable in the case of a pre-*Almeida-Sanchez* stop for interrogation without a search.

Because of the importance of prompt resolution of the question presented here to the administration of the Border Patrol's responsibilities, and in view of the existing conflict between the cir-

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1. The decision in this case conflicts with that of the Court of Appeals for the Tenth Circuit in *United States* v. *Bowman, supra.* The court of appeals in the present case held that a warrantless immigration stop of a vehicle may be made only when the officers have a "founded suspicion" that the occupants of the vehicle are aliens whose presence in this country is unlawful. The Tenth Circuit, by contrast, held in *Bowman* that a stop of a vehicle "for the limited purpose of determining [the occupants'] citizenship" (487 F. 2d at 1231) is permissible without regard to whether the officers reasonably suspect that the occupants are present in this country unlawfully.

In *Bowman*, Border Patrol officers stopped the defendant in his car at a fixed checkpoint near Truth-or-Consequences, New Mexico, and, while questioning him about his citizenship, one of the officers detected the odor of marihuana. The officers then searched the car and discovered the marihuana in a footlocker and suitcase in the car's trunk. Ruling that the odor of marihuana gave the officers probable cause to search the car after it had been stopped, the court of appeals turned to the question of "the validity of the initial stopping" of the vehicle (*ibid.*). The court observed that 8 U.S.C. 1357(a)(1) authorizes Border Patrol officers "to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States * * *." It held that *Almeida-Sanchez* limits only the Border Patrol's

cuits on that question, we do not present in this petition the retroactivity question presented in *Peltier* and we do not here urge the nonretroactivity of *Almeida-Sanchez* as a ground for reversal.

authority to *search* a vehicle for concealed aliens under 8 U.S.C. 1357(a)(3) and does not affect its authority to *stop* a car under Section 1357(a)(1) "to make routine inquiries as to an individual's nationality" (*ibid.*).[4]

The stop in *Bowman* occurred at a fixed immigration checkpoint that was in operation, whereas the stop in the present case was effected by officers patrolling in the area of a fixed checkpoint that was not in operation. The court's reasoning in *Bowman,* however, was not limited to checkpoint stops, and the court's reasoning in this case was not limited to roving patrol stops. Indeed, the Ninth Circuit subsequently held, on the authority of its decision in this case, that checkpoint stops, like roving patrol stops, require "a reasonable belief, founded upon 'articulable' facts, that one or more of the people to be interrogated are aliens illegally in the country" (*United States* v. *Esquer-Rivera,* C.A. 9, Nos. 74—1110 and 74–1099, decided July 1, 1974, slip. op. 2).

[4] Subsequently, in *United States* v. *Newman*, 490 F. 2d 993, the Tenth Circuit reversed a defendant's conviction because the marihuana discovered in his trunk was the product of an illegal search made without probable cause after he had been stopped at a turnpike gate near Miami, Oklahoma. The court pointed out, however (*id.* at 995):

"We do not question the right of a Border Patrol Agent to briefly detain an individual for the purpose of ascertaining his nationality. To this extent [the agent's] initial stopping of the appellants' vehicle in the case at bar was, in and of itself not illegal. * * *"

The upshot is that warrantless stops for interrogation are constitutionally permissible in the Tenth Circuit but constitutionally forbidden in the Ninth Circuit.[5]

2. The conflict should be resolved by this Court. The fair and effective enforcement of our Nation's immigration laws requires a definitive determination of the Border Patrol's authority to conduct routine interrogation stops of vehicles, particularly in the border areas, to determine the nationality and status of persons believed to be aliens. There are numerous cases pending in the lower federal courts that may turn on whether evidence derived from such stops may properly be introduced at trial. That determination should not, we submit, depend on the fortuity of the particular jurisdiction in which the stop occurred.

Moreover, it is important for the Border Patrol and the courts to know whether warrants are required for interrogation stops, and, if so, what standards should be applied by the courts in considering applications for such warrants. In the Ninth Circuit, for example, where the court of appeals has held that warrantless checkpoint searches and warrantless stops for interrogation violate the Fourth Amendment, the magistrates have refused to issue warrants for searches of automobiles at checkpoints and, in some cases, even for interrogation stops at some checkpoints. Since the

[5] The Fifth Circuit has not decided the issue. One panel, however, expressed "serious doubt" as to the validity of warrantless stops for interrogation in light of *Almeida-Sanchez*. *United States* v. *Rodriguez-Hernandez*, 493 F. 2d 168, 169, pending on petition for a writ of certiorari, No. 73-6851.

success of the Border Patrol's enforcement effort depends upon a coordinated program of stops and limited searches of vehicles at permanent and temporary checkpoints away from the border and by roving patrols, the inability to operate a particular checkpoint may substantially weaken the entire network by permitting illegal alien traffic to bypass other checking operations and to flow freely through the unpatrolled area. The existing uncertainty concerning the need for stop warrants and the showing necessary to secure them seriously threatens to undermine the Border Patrol's effectiveness.

3. On the merits, we submit that the decision in this case represents an incorrect application of the principles of *Almeida-Sanchez*. There is, in our view, a critical distinction of constitutional dimension between a search of an automobile for concealed aliens and a brief stop of an automobile to question its occupants about their right to be in this country. Even a limited search for aliens—involving an inspection of the car's passenger compartment, its trunk, and perhaps under the hood or behind the rear seat—is far more intrusive than a stop to ask a few questions.

Mr. Justice Powell's concurring opinion in *Almeida-Sanchez* recognized that the reasonableness of a search of an automobile for aliens does not necessarily depend upon the existence of probable cause to believe that a concealed illegal alien will be found in the automobile. Rather, as in *Camara* v. *Municipal Court*, 387 U.S. 523, a particular search may be reasonable if conducted as part of an area-wide program of searches that is itself reasonable, measured by the existence of a legitimate law enforcement need on the one hand and

the extent of the official intrusion on the other. Mr. Justice Powell thus concluded that "under appropriate limiting circumstances there may exist a constitutionally adequate equivalent of probable cause to conduct roving vehicular searches in border areas" (413 U.S. at 279).

In the context of a brief stop to make a limited inquiry about a person's nationality, there need not exist even an "equivalent of probable cause" (*ibid.*). We acknowledge that such a stop in the circumstances of this case is a sufficient interference with an individual's "personal security" to constitute a "seizure" under the Fourth Amendment (*Terry* v. *Ohio,* 392 U.S 1, 19 and n. 16). As this Court has held, however, "a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest" (*id.* at 22).

Just as there can be a "constitutionally adequate equivalent of probable cause to conduct roving vehicular searches in border areas" (413 U.S. at 279), there can be circumstances that justify *stopping* an automobile to make a limited inquiry of its occupants even though the officers have no reason to believe that the occupants of the particular vehicle are aliens whose presence in this country is unlawful. Such circumstances exist in the area of the Mexican border, where there is a high incidence of illegal transportation of aliens who have entered this country unlawfully. Border Patrol officers may, we submit, make an

interrogation stop of a vehicle when they reasonably believe that its occupants are aliens, even if they have no reason to believe that the occupants are illegal aliens.

Although, on Mr. Justice Powell's reasoning in *Almeida-Sanchez,* a prior judicial determination is required to assure the reasonableness of the Border Patrol's plans for particular roving patrol search operations, no such prior judicial determination is required to assure the reasonableness of a limited interrogation stop such as the one conducted in the present case. The "intrusion upon constitutionally protected rights" (*Terry* v. *Ohio, supra,* 392 U.S. at 19, n. 16) is, by comparison to a search of an automobile, so reduced that there is little need for prior judicial supervision of the stopping procedure. In contrast to the situation as viewed by the majority in *Almeida-Sanchez,* there is here no claim of an "extravagant license to search" (413 U.S. at 268).

That is not to say that an aggrieved person may not allege and prove in a particular factual setting that the stop of his automobile was unreasonable or that the manner and scope of the officers' subsequent questioning were unlawful. We do say, however, that the Fourth Amendment values at stake are adequately protected when these claims are adjudicated *after* the stop and questioning have occurred and in the context of an adversary proceeding on specific facts.

We emphasize that a warrantless roving patrol stop for purposes of interrogation must be conducted in accordance with the Border Patrol's statutory authority. That is to say, the officers may stop a car only "to interrogate any alien or person believed to be an alien

as to his right to be or to remain in the United States" (8 U.S.C. 1357(a)(1)). Thus, while an officer need not, for the reasons we have discussed, have probable cause to believe that the automobile's occupants are aliens illegally present in this country—*i.e.*, that a crime is being committed—he must reasonably believe that they are aliens.

That requirement is satisfied, we submit, where, as here, officers patrolling in an area known to have a high incidence of illegal alien traffic, near a fixed checkpoint that has been closed because of inclement weather,[6] observe a northbound automobile containing three persons who appear to be of Mexican descent. In these circumstances, a brief stop of the car to inquire whether the occupants have a right to be in this country does not violate the Fourth Amendment and does not exceed the scope of the officers' authority under the statute.[7]

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[6] More than 12,000 deportable aliens were apprehended at the San Clemente checkpoint in fiscal year 1973 (*United States* v. *Baca*, *supra*, 368 F. Supp. at 410). "[I]t is an unusual 8 hour shift that does not result in at least 20 or 30 apprehensions" (*ibid.*).

[7] Moreover, Section 1357(a)(3)—which authorizes officers within a reasonable distance of the border to search vehicles for aliens—may comprehend independent authority to stop a vehicle without searching it, not principally to investigate the nationality of the visible occupants, but to ask questions designed to ascertain whether the vehicle contains any *concealed* aliens. On that reasoning, it may be that a vehicle could be stopped even without a belief that its visible occupants are aliens.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 1974.

APPENDIX A

United States Court of Appeals for the Ninth Circuit

No. 73-2161

UNITED STATES OF AMERICA, APPELLEE

v.

FELIX HUMBERTO BRIGNONI-PONCE, APPELLANT

OPINION

[Decided June 14, 1974]

Appeal from the United States District Court for the Southern District of California

Before CHAMBERS, MERRILL, KOELSCH, BROWNING, DUNIWAY, ELY, HUFSTEDLER, WRIGHT, TRASK, CHOY, GOODWIN, WALLACE, and SNEED, *Circuit Judges.*

GOODWIN, *Circuit Judge:* Felix Humberto Brignoni-Ponce appeals his conviction for transporting aliens in violation of 8 U.S.C. § 1324(a)(2). Two illegal aliens were discovered following a warrantless stop of his car near the San Clemente immigration checkpoint. The government contends that even if recent decisions by the Supreme Court and this court have stripped the Border Patrol of its authority to stop vehicles and search them for aliens, the Border Patrol still retains the authority, exercised in this case, to stop and interrogate any person believed to be an alien as to his right to remain in the United States. We reject that contention and reverse the conviction.

On March 11, 1973, the San Clemente immigration checkpoint, located in San Onofre, California, approximately 65 miles north of the Mexican border on Interstate 5 between San Diego and Los Angeles, was

closed because of inclement weather. During the early morning hours, an agent of the Border Patrol was observing northbound traffic from his patrol car, parked at a ninety-degree angle to the interstate highway. Observing a passing vehicle whose occupants appeared to be of Mexican descent, the agent pursued the car and stopped it. Investigation soon revealed that the two passengers were illegally in the United States. They and the driver, Brignoni-Ponce, were then arrested.

In *United States v. Peltier,* F. 2d (9th Cir., May 9, 1974) (en banc), this court held that the rule announced by the Supreme Court in *Almeida-Sanchez v. United States,* 413 U.S. 266 (1973), applied retroactively to all cases involving roving-patrol searches which were pending on appeal at the time that *Almeida-Sanchez* was announced. However, in *United States v. Bowen,* F. 2d (9th Cir., May 9, 1974) (en banc), we also held that, although searches by border-patrol agents at fixed checkpoints violated the Fourth Amendment, *Almeida-Sanchez* would not be applied retroactively to fixed-checkpoint searches conducted prior to the date of decision of *Almeida-Sanchez.*

The stop of Brignoni-Ponce's car was made before the decision in *Almeida-Sanchez* was announced. The first question, then, is whether or not the stop was more like one by a roving patrol than one at a fixed checkpoint. Although we held in *United States v. Morgan,* F. 2d (9th Cir., June 14, 1974) en banc), that searches at the San Clemente checkpoint were fixed-checkpoint searches rather than roving-patrol searches. Brignoni-Ponce's car was not stopped at the checkpoint. Rather, because the checkpoint was closed and no marked barricades designed to impede vehicular traffic were in place, Brignoni-Ponce would

have proceeded undisturbed except for the decision to pursue him. His car was overtaken and stopped north of the closed checkpoint. Although the line between a roving-patrol stop and a fixed-checkpoint stop is not a clear one, we hold that pursuing a passing car and flagging it to the side of the road is conduct more characteristic of a roving-patrol stop than of a fixed-checkpoint stop. *See United States v. Grijalva-Carrera,* F. 2d (9th Cir., June 14, 1974) (en banc); *United States v. Bowen,* F. 2d at (slip opinion at 4–5).

The government contends, however, that even if this court holds that the stop was a roving-patrol stop, that holding would not dispose of this case. It argues that *Almeida-Sanchez, Peltier, Bowen, Morgan,* and *Grijalva-Carrera* all involved the constitutionality of searches without probable cause, pursuant to 8 U.S.C. § 1357(a)(3). This case, by contrast, involves merely a stop, pursuant to 8 U.S.C. § 1357(a)(1), for the purpose of interrogating a person believed to be an alien regarding his right to remain in the United States. In support of its argument, the government cites the recent decision by the Court of Appeals for the Tenth Circuit in *United States v. Bowman,* 487 F. 2d 1229 (10th Cir. 1973), holding that *Almeida-Sanchez* applied only to searches under § 1357(a)(3) and not to stops for interrogation under § 1357(a)(1).

We cannot adopt the approach taken by our brothers on the Tenth Circuit. Section 1357(a)(1), unlike § 1357(a)(3), has no requirement that the stop be within a "reasonable distance" from the border. Under the Tenth Circuit's view, immigration officials could stop a vehicle anywhere in the country in order to interrogate its occupants as to their right to be in the United States, without a warrant, without probable

cause, and without even a reasonable suspicion that any of the occupants are illegal aliens.

Such stops are entirely inconsistent with the Supreme Court's opinion in *Almeida-Sanchez*. Although the facts of *Almeida-Sanchez* called into question only that portion of § 1357(a) involving the Border Patrol's authority to stop and search vehicles, the Court's opinion reflects at least as much concern with the initial stop as with the subsequent search. *See, e.g.,* 413 U.S. at 268:

> "* * * It is undenied that the Border Patrol had no search warrant, and that there was no probable cause of any kind for the *stop* or the subsequent search * * *." (Emphasis added.)

And 413 U.S. at 272:

> "* * * [N]either this Court's automobile search decisions nor its administrative inspection decisions provide any support for the constitutionality of the *stop* and search in the present case * * *." (Emphasis added.)

The Court ended its opinion, 413 U.S. at 274–75, by quoting from *Carroll v. United States,* 267 U.S. 132 (1925), as follows:

> "* * * It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. Travellers may be stopped in crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in. But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise * * *." 267 U.S. at 153–54.

Had the Court intended to leave intact the government's asserted right to stop cars on mere suspicion anywhere in the country in order to interrogate their occupants as to their right to remain in the United States, we doubt that it would have quoted this language fom *Carroll.* Even more than immigration searches which had to be conducted within an area no more than 100 miles from the border, these immigration stops offend the "right to free passage without interruption" of "those lawfully within the country."

Moreover, the Tenth Circuit's position is inconsistent with settled law of this circuit. In *United States v. Mallides,* 473 F. 2d 859, 861 (9th Cir. 1973), we held that the stop of a vehicle by police officers, even for the limited purpose of questioning its occupants, must be based upon a "founded suspicion." *See also United States v. Ward,* 488 F. 2d 162, 168–69 (9th Cir. 1973) (en banc). This holding was subsequently applied to investigatory stops by border-patrol agents. *See, e.g., United States v. Mora-Chavez,* — F. 2d — (9th Cir., Apr. 26, 1974); *United States v. Bugarin-Casas,* 484 F. 2d 853, 854 (9th Cir. 1973), *cert. denied,* — U.S. — (1974).

Likewise, the Court of Appeals for the District of Columbia Circuit has held that immigration officials, in accordance with § 1357(a)(1), may make forcible detentions of a temporary nature for the purposes of interrogation under circumstances creating a reasonable suspicion, not arising to the level of probable cause to arrest, that the individual so detained is illegally in this country. *Au Yi Lau et al. v. United States Immigration & Naturalization Service,* 445 F. 2d 217,

223 (D.C. Cir.) (later vacated as to one party only), *cert. denied,* 404 U.S. 864 (1971).

Here, the border-patrol agents who stopped Brignoni-Ponce's car did not possess facts which constituted a founded suspicion that he or his passengers were illegal aliens. All that they knew was that Brignoni-Ponce and his companions appeared to be of Mexican descent and were in a sedan traveling north on Interstate 5, approximately 65 miles north of the Mexican border. This is not enough. As we said in *United States v. Mallides:*

> "* * * [T]here is nothing suspicious about six persons riding in a sedan. The conduct does not become suspicious simply because the skins of the occupants are nonwhite * * *." 473 F. 2d at 861.

We hold, then, that the stop and interrogation of Brignoni-Ponce and the passengers in his car were illegal, and the fruits of the illegal conduct were inadmissible. *See United States v. Guana-Sanchez,* 484 F. 2d 590 (7th Cir. 1973), *petition for cert. filed* November 23, 1973 (U.S. No. 73–820).

Reversed and remanded.

APPENDIX B

United States Court of Appeals For the Ninth Circuit

No. 73–2161, DC No. 14805

UNITED STATES OF AMERICA, APPELLEE

v.

FELIX HUMBERTO BRIGNONI-PONCE, APPELLANT

JUDGMENT

Appeal from the United States District Court for the Southern District of California.

This Cause came on to be heard on the Transcipt of the Record from the United States District Court for the Southern District of California and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is

Reversed and Remanded.

A true copy
Attest June 20, 1974.

EMIL E. MELFI, JR.,
Chief Deputy and Acting Clerk.
RAY HEWITT,
Senior Deputy.

Filed and entered June 14, 1974.

U.S. GOVERNMENT PRINTING OFFICE: 1974

Supreme Court, U. S.
FILED
NOV 27 1974
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-114

UNITED STATES OF AMERICA, PETITIONER

v.

FELIX HUMBERTO BRIGNONI-PONCE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 13, 1974
CERTIORARI GRANTED OCTOBER 15, 1974

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-114

UNITED STATES OF AMERICA, PETITIONER

v.

FELIX HUMBERTO BRIGNONI-PONCE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Docket Entries

3-14-73	1—Ent ord and fld Ind. JS-2 Bond Fixed at $7,500 (CORP) (CASH)
	2—Fld Order Appointing Attorney Fed Defs
	3—Fld Order Appointing Attorney Bertha Carlos as to mat wits.
3-15-73	4—Filed Magistrates Transcript
3-16-73	5—Deft arraigned. Ord set for O/H for 3-20-73 @ 10 a.m. Ord assigned to Judge TURRENTINE. Plea: NG, all cts. (McCUE)
	6—BAIL REVIEW—Affirmed. BAIL REVIEW as to mat wits—Affirmed; cont'd to 3-26-73 @ 9 a.m. mat wit. ELSA MARINA HERNANDEZ-SERABIA does not have to appear this date. (HARRIS)
3-20-73	7—Omnibus Form fld. Ord. assigned to Judge TURRENTINE for Jury Trial setting on 3-20-73 @ 9 a.m. (McCUE)
3-26-73	8—Ent Ord cont'd to 4-24-73 @ 2 p.m. for mots. (T)
3-30-73	9—BAIL REVIEW—Affirmed. Cont'd to 4-25-73 @ 9 a.m. (HARRIS)
4-12-73	10—JURY TRIAL—Jurors impaneled & sworn. Swore wits. fld exhibits. Fld deft's requested questions for Voir Dire. Fld Govt's requested jury instrs. Ent mot for J/A—DENIED. Verdict: G both cts. Jury polled. Ent ord ref to P/O for I/R & cont'd to 5-14-73 @ 9 a.m. for sent. (T) Fld verdict.
4-13-73	11—Fld ORD releasing & Exonerating Bonf of mat wits (2) & dismissing complt. (HARRIS) Issd c.c. of ORD to U.S. Mars.
5-14-73	12—Ent Ord I.S.S. on Ct. 2, & 5 yrs. prob. Ent ord on Ct 1 Comm to Cust AG for 4 yrs. Impris. purs to 18:4208(a)(2). (T) JS-3. (ENT 5-16-73)
	13—Fld judgment, issd cys. (ENT 5-16-73)

5-20-73 14—Fld Judgment, retd executed.

5-22-73 15—Fld NOT OF APPEAL; Designation of Record on Appeal; & Certification of continuing eligibility re in Forma Pauperis. (T)

6-15-73 Fld orig & 3 cpys reporter's transcripts.

6-20-73 Mld Clerk's Record t/w Reporter's Transcript to USCA

7-13-73 16—Fld mot to supplement Record on Appeal. Fld stip & ORD that deft's mot to suppress the aliens found in stop of deft's car, may be heard @ time of trial w/ ord thereon. (T)

7-13-73 Mld Supplemental Clerk's Record to USCA

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

November 1972 Grand Jury

UNITED STATES OF AMERICA, PLAINTIFF, v. FELIX HUMBERTO BRIGNONI-PONCE, DEFENDANT.	No. 14805 Criminal INDICTMENT Title 8, U.S.C., Sec. 1324(a)(2)—Illegal Transportation of Aliens

The grand jury charges:

COUNT ONE

On or about March 11, 1973, within the Southern District of California, defendant

FELIX HUMBERTO BRIGNONI-PONCE

knowing that an alien, namely,

Elsa Marina Hernandez-Serabia

was then in the United States in violation of law and having reasonable grounds to believe that said alien's entry into the United States occurred less than three years prior to the aforesaid date, did transport and move, and attempt to transport and move, said alien(s) within the United States, in furtherance of such violation of law; in violation of Title 8, United States Code, Section 1324(a)(2).

COUNT TWO

On or about March 11, 1973, within the Southern District of California, defendant

FELIX HUMBERTO BRIGNONI-PONCE

knowing that an alien, namely,

Josie Nunez-Ayala

was then in the United States in violation of law and, having reasonable grounds to believe that said alien's entry into the United States occurred less than three years prior

to the aforesaid date, did transport and move, and attempt to transport and move, said alien within the United States, in furtherance of such violation of law, in violation of Title 8, United States Code, Section 1324(a)(2).

A TRUE BILL:

Leo H. Johnson
Foreman

/s/ Harry D. Steward
HARRY D. STEWARD
United States Attorney

EXCERPTS FROM THE TRIAL TRANSCRIPT

* * * * *

DIRECT EXAMINATION OF TERRANCE J. BRADY

* * * * *

By MR. SHANAHAN:

Q. Mr. Brady, what is your occupation?
A. Border Patrol Agent.
Q. And how long have you been so employed?
A. Four and a half years.
Q. And as a Border Patrol Agent, what are your duties?
A. To protect and prevent the illegal entry of aliens and smuggling of aliens into the United States.
Q. And were you so employed on March 11, 1973?
A. I was.
Q. And where were you so employed, sir?
A. San Clemente station, California.
Q. And were you on duty on that particular day?
A. I was, sir.
Q. And what were your duties on that particular day?
A. We were observing traffic. Due to the checkpoint, which we usually check traffic on the highway was closed, we were observing traffic passing through the checkpoint area.
Q. Now, where is that area you just referred to?
A. It's on the highway about four miles south of the City of San Clemente.
Q. What highway?
A. Interstate Highway 5.
Q. And you were observing traffic heading in which direction?
A. Northbound.
Q. And you mentioned that the checkpoint is usually in operation. Would you explain what the checkpoint is, and how it is set up when it is in operation?
A. The San Clemente station, the Border Patrol is a traffic check operation, and we check the northbound traffic, routine immigration inspection as to citizenship of the occupants, and we search the vehicles for illegal aliens.
Q. This is when the checkpoint is in operation?
A. Yes, sir.
Q. Do you stop traffic there?
A. Yes, sir. They come to a complete stop.

Q. Is there some type of building or structure that is visible when the checkpoint is in operation?

A. There are three signs that warn the motorists to stop for inspection ahead.

Q. Is there anything to indicate to the motorist whether or not the checkpoint is in operation?

A. Yes, sir. Flashing lights, and the signs which indicate for the motorist to come to a stop.

Q. Is there any type of van, or anything like this, that you use at the checkpoint?

A. We place two vehicles on the highway in the lanes, when we are checking two lanes; and, then, they are facing south, and they have red lights flashing.

Q. Again, this is when the checkpoint is in operation?

A. Yes, sir.

Q. On this particular day, were any of these lights on, or the vans out in the road at that point?

A. No, sir.

Q. Now, how often is the checkpoint in operation on a normal basis?

A. Constantly.

Q. As I understand it, it wasn't in operation at this time. When is the checkpoint not in operation?

A. Due to lack of manpower and inclement weather.

Q. What was the weather like on this particular day?

A. It was inclement weather.

Q. And is this the normal procedure that you don't have it up on inclement weather?

A. Yes, sir. Never on inclement weather.

Q. Now, where were you in relation to the checkpoint?

A. We stand off of the highway right at the checkpoint in patrol cars observing the northbound traffic.

Q. And was anyone else with you?

A. Agent Harkins.

Q. And what did you observe during this period? Did you observe anything unusual?

A. We observed the cars traveling north, and we observed a Chevrolet going through that we wished to inspect.

Q. Approximately what time was this?

A. I don't recall. It was during the darkness.

Q. Early evening hours, is that correct?

A. I believe so.

Q. And what did you do?

A. We pursued the vehicle and stopped it.

Q. And what happened when you stopped the vehicle?

A. Agent Harkins approached the driver's side, and I stood back to—for his protection backing him up on the right rear portion of the vehicle.

Q. How many people were in the vehicle?

A. Three.

Q. And after Agent Harkins went to the driver, what did you do?

A. I went to the passenger side and talked to the passengers in the vehicle.

Q. Without telling me what they said, was the conversation in English or Spanish?

A. Spanish.

Q. With both people?

A. With both people.

Q. And to your knowledge, could they speak any English?

A. To my knowledge they didn't know—understand English at all.

Q. And what did you question them concerning?

A. Their citizenship.

Q. Did you request papers?

A. I did.

Q. And did you receive any papers?

A. No papers.

Q. Now, after this conversation—let me back up a little bit.

Did you observe the driver?

A. Yes, sir.

Q. And would you recognize the driver if you saw him in court again?

A. I would, sir.

Q. And if you see the driver in this courtroom, point him out and describe what he is wearing.

A. He's seated at defense table, to the left side of the counsel.

THE COURT: May the record reflect the identification of the defendant by the witness.

MR. SHANAHAN: Thank you, your Honor.

By MR. SHANAHAN:

Q. All right. After having these conversations, what did you do?

A. I established that the two passengers were in the United States illegally.

MR. RAGEN: Your Honor, I would object to that, and move it be stricken. It's hearsay.

THE COURT: Overruled.

By MR. SHANAHAN:

Q. What did you do after you had this conversation?

A. After I established that they were illegal aliens in the United States, I stepped to the rear of the vehicle where the defendant was standing with Agent Harkins, where they were inspecting the trunk; and I warned the defendant as to his rights.

Q. And what rights were those?

A. They are Miranda rights.

Q. All right. Do you have some type of card, or something that you used to give those rights?

A. Yes, sir.

Q. And after—after you gave these rights, what occurred?

A. We placed the defendant in custody, and the passengers in his vehicle in custody, and returned them to the San Clemente Border Patrol station.

Q. Had you ever seen the defendant on prior occasions?

A. I don't recall.

MR. SHANAHAN: I have no further questions at this time, your Honor.

THE COURT: Cross-examine.

CROSS-EXAMINATION

By MR. RAGEN:

Q. Agent Brady, what was the reason you stopped the car?

A. Routine immigration inspection.

Q. You said there was nothing unusual about it, other than it was traveling north, is that correct?

A. That's true.

Q. What type of car was this?

A. Chevrolet.

Q. Chevrolet. Do you know what year that was?

A. I think I recall that it was a 1969 Chevrolet.

Q. Could you see the occupants of the car from your position on the roadway?

A. Yes, sir.

Q. You could see inside the car?

A. Yes, sir.

Q. Did you use a light to do that?

A. None, other than the headlights of the patrol car.

Q. If I understand you correctly, then, your car is parked at a ninety degree angle to the freeway?

A. Yes, sir.

Q. And so as cars drive by your lights shine in?

A. Yes, sir.

Q. Did these people inside the car appear to be of Mexican descent to you?

A. Yes, sir.

Q. And that, if there was any, appeared to be the reason that you stopped them?

A. Yes, sir.

Q. Did you attempt to speak with the passengers in this car in English?

A. When I approached the right side, identified myself as an immigration officer; and, then, I asked them their citizenship in English, and that is routine.

Q. And what was their response?

A. They didn't understand English.

Q. They said that?

A. In Spanish.

Q. I see. And you indicated you used a card to advise them of their rights?

A. Yes. Well, it's a paper in English and in Spanish.

Q. Did you hand that to the defendant, Mr. Brignoni, or did you read it to him?

A. I read it to him.

Q. Do you have that card here today?

A. Yes, sir.

Q. Is that a card that is assigned to you that you keep on your person at all times?

A. Yes, sir.

MR. RAGEN: I have nothing further, your Honor.

• • • • •

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

(HON. HOWARD B. TURRENTINE)

UNITED STATES OF AMERICA, PLAINTIFF, v. FELIX H. BRIGNONI, DEFENDANT.	Criminal No. 14805 STIPULATION AND ORDER

It is hereby agreed by and between the parties and their counsel that the defendant's motion to suppress the aliens found in the stop of defendant's car, which motion is based upon the dissenting opinion in *United States v. Almeida-Sanchez*, 452 F.2d 459 (9th Cir. 1971), may be heard at the time of trial.

Dated:

/s/ Donald F. Shanahan
DONALD F. SHANAHAN
Assistant United States Attorney

/s/ Frank J. Ragen
FRANK J. RAGEN
Federal Defenders of San Diego, Inc.
Attorneys for Defendant

The above motion to suppress is denied.

Dated: JUL 13, 1973

/s/ Howard B. Turrentine
HOWARD B. TURRENTINE
United States District Court Judge

[JUDGMENT AND COMMITMENT]

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
CALIFORNIA

UNITED STATES OF AMERICA v. FELIX HUMBERTO BRIGNONI-PONCE	No. 14805—Criminal

On this 14th day of May, 1973 came the attorney for the government and the defendant appeared in person and by counsel, Frank Ragen of Federal Defenders,

IT IS ADJUDGED that the defendant upon his plea of not guilty and a verdict of guilty has been convicted of the offense of illegal transportation of aliens, in violation of 8 USC 1324(a)(2), as charged in count 1 and 2 of the indictment in two counts, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that on count #1 the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FOUR (4) YEARS and pursuant to 18 USC 4208(a)(2), the Court specifies that the defendant shall become eligible for parole at such time as may be determined by the Board of Parole, and on count number two the imposition of sentence is suspended and the defendant placed on probation for a period of FIVE (5) years, on condition that he obey all laws, Federal, State, or Municipal, that he comply with all lawful rules and regulations of the Probation Department. The period of probation is to commence upon the defendant's release from confinement or parole, whichever comes first.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Mar-

shal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Howard B. Turrentine
HOWARD B. TURRENTINE
United States District Judge.

Filed: May 14, 1973
William W. Luddy

By: Richard I. Bellman,
Deputy Clerk.

United States Court of Appeals for the Ninth Circuit

No. 73-2161

UNITED STATES OF AMERICA, APPELLANT

v.

FELIX HUMBERTO BRIGNONI-PONCE, APPELLANT

OPINION

[Decided June 14, 1974]

Appeal from the United States District Court for the Southern District of California

Before CHAMBERS, MERRILL, KOELSCH, BROWNING, DUNIWAY, ELY, HUFSTEDLER, WRIGHT, TRASK, CHOY, GOODWIN, WALLACE, and SNEED, *Circuit Judges.*

GOODWIN, *Circuit Judge:* Felix Humberto Brignoni-Ponce appeals his conviction for transporting aliens in violation of 8 U.S.C. § 1324(a)(2). Two illegal aliens were discovered following a warrantless stop of his car near the San Clemente immigration checkpoint. The government contends that even if recent decisions by the Supreme Court and this court have stripped the Border Patrol of its authority to stop vehicles and search them for aliens, the Border Patrol still retains the authority, exercised in this case, to stop and interrogate any person believed to be an alien as to his right to remain in the United States. We reject that contention and reverse the conviction.

On March 11, 1973, the San Clemente immigration checkpoint, located in San Onofre, California, approximately 65 miles north of the Mexican border on Interstate 5 between San Diego and Los Angeles, was closed because of inclement weather. During the early morning hours, an agent of the Border Patrol was observing northbound traffic from his patrol car, parked at a ninety-degree angle to the interstate highway. Observing a passing vehicle whose occupants appeared to be of Mexican descent, the agent pursued the car and stopped it. Investigation soon revealed that the

two passengers were illegally in the United States. They and the driver, Brignoni-Ponce, were then arrested.

In *United States v. Peltier*, F. 2d (9th Cir., May 9, 1974) (en banc), this court held that the rule announced by the Supreme Court in *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973), applied retroactively to all cases involving roving-patrol searches which were pending on appeal at the time that *Almeida-Sanchez* was announced. However, in *United States v. Bowen*, F. 2d (9th Cir., May 9, 1974) (en banc), we also held that, although searches by border-patrol agents at fixed checkpoints violated the Fourth Amendment, *Almeida-Sanchez* would not be applied retroactively to fixed-checkpoint searches conducted prior to the date of decision of *Almeida-Sanchez*.

The stop of Brignoni-Ponce's car was made before the decision in *Almeida-Sanchez* was announced. The first question, then, is whether or not the stop was more like one by a roving patrol than one at a fixed checkpoint. Although we held in *United States v. Morgan*, F. 2d (9th Cir., June 14, 1974) (en banc), that searches at the San Clemente checkpoint were fixed-checkpoint searches rather than roving-patrol searches, Brignoni-Ponce's car was not stopped at the checkpoint. Rather, because the checkpoint was closed and no marked barricades designed to impede vehicular traffic were in place, Brignoni-Ponce would have proceeded undisturbed except for the decision to pursue him. His car was overtaken and stopped north of the closed checkpoint. Although the line between a roving-patrol stop and a fixed-checkpoint stop is not a clear one, we hold that pursuing a passing car and flagging it to the side of the road is conduct more characteristic of a roving-patrol stop than of a fixed-checkpoint stop. *See United States v. Grijalva-Carrera*, F. 2d (9th Cir., June 14, 1974) (en banc); *United States v. Bowen*, F. 2d at (slip opinion at 4-5).

The government contends, however, that even if this court holds that the stop was a roving-patrol stop, that holding would not dispose of this case. It argues that *Almeida-Sanchez*, *Peltier*, *Bowen*, *Morgan*, and *Grijalva-Carrera* all involved the constitutionality of searches without probable cause, pursuant to 8 U.S.C. § 1357(a)(3). This case, by contrast, involves merely a stop, pursuant to 8 U.S.C. § 1357(a)(1), for the purpose of interrogating a person believed to be an alien regarding his right to remain

in the United States. In support of its argument, the government cites the recent decision by the Court of Appeals for the Tenth Circuit in *United States v. Bowman*, 487 F. 2d 1229 (10th Cir. 1973), holding that *Almeida-Sanchez* applied only to searches under § 1357(a)(3) and not to stops for interrogation under § 1357(a)(1).

We cannot adopt the approach taken by our brothers on the Tenth Circuit. Section 1357(a)(1), unlike § 1357(a)(3), has no requirement that the stop be within a "reasonable distance" from the border. Under the Tenth Circuit's view, immigration officials could stop a vehicle anywhere in the country in order to interrogate its occupants as to their right to be in the United States, without a warrant, without probable cause, and without even a reasonable suspicion that any of the occupants are illegal aliens.

Such stops are entirely inconsistent with the Supreme Court's opinion in *Almeida-Sanchez*. Although the facts of *Almeida-Sanchez* called into question only that portion of § 1357(a) involving the Border Patrol's authority to stop and search vehicles, the Court's opinion reflects at least as much concern with the initial stop as with the subsequent search. *See, e.g.*, 413 U.S. at 268:

> "* * * It is undenied that the Border Patrol had no search warrant, and that there was no probable cause of any kind for the *stop* or the subsequent search * * *." (Emphasis added.)

And 413 U.S. at 272:

> "* * * [N]either this Court's automobile search decisions nor its administrative inspection decisions provide any support for the constitutionality of the *stop* and search in the present case * * *." (Emphasis added.)

The Court ended its opinion, 413 U.S. at 274-75, by quoting from *Carroll v. United States*, 267 U.S. 132 (1925), as follows:

> "* * * It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. Travellers may be stopped in crossing an interna-

> tional boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in. But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise * * *." 267 U.S. at 153-54.

Had the Court intended to leave intact the government's asserted right to stop cars on mere suspicion anywhere in the country in order to interrogate their occupants as to their right to remain in the United States, we doubt that it would have quoted this language from *Carroll*. Even more than immigration searches which had to be conducted within an area no more than 100 miles from the border, these immigration stops offend the "right to free passage without interruption" of "those lawfully within the country."

Moreover, the Tenth Circuit's position is inconsistent with settled law of this circuit. In *United States v. Mallides*, 473 F. 2d 859, 861 (9th Cir. 1973), we held that the stop of a vehicle by police officers, even for the limited purpose of questioning its occupants, must be based upon a "founded suspicion." *See also United States v. Ward*, 488 F. 2d 162, 168-69 (9th Cir. 1973) (en banc). This holding was subsequently applied to investigatory stops by border-patrol agents. *See, e.g., United States v. Mora-Chavez*, — F. 2d — (9th Cir., Apr. 26, 1974); *United States v. Bugarin-Casas*, 484 F. 2d 853, 854 (9th Cir. 1973), *cert. denied*, — U.S. — (1974).

Likewise, the Court of Appeals for the District of Columbia Circuit has held that immigration officials, in accordance with § 1357(a)(1), may make forcible detentions of a temporary nature for the purposes of interrogation under circumstances creating a reasonable suspicion, not arising to the level of probable cause to arrest, that the individual so detained is illegally in this country. *Au Yi Lau et al. v. United States Immigration & Naturalization Service*, 445 F. 2d 217, 223 (D.C. Cir.) (later vacated as to one party only), *cert. denied*, 404 U.S. 864 (1971).

Here, the border-patrol agents who stopped Brignoni-Ponce's car did not possess facts which constituted a founded suspicion that he or his passengers were illegal aliens. All that they knew was that Brignoni-Ponce and his companions appeared to be of Mexican descent and were in a sedan traveling north on Interstate 5, approximately 65 miles north of the Mexican border. This is not enough. As we said in *United States v. Mallides*:

> "* * * [T]here is nothing suspicious about six persons riding in a sedan. The conduct does not become suspicious simply because the skins of the occupants are nonwhite * * *." 473 F. 2d at 861.

We hold, then, that the stop and interrogation of Brignoni-Ponce and the passengers in his car were illegal, and the fruits of the illegal conduct were inadmissible. *See United States v. Guana-Sanchez*, 484 F. 2d 590 (7th Cir. 1973), *petition for cert. filed* November 23, 1973 (U.S. No. 73-820).

Reversed and remanded.

United States Court of Appeals For the Ninth Circuit

No. 73-2161, DC No. 14805

UNITED STATES OF AMERICA, APPELLEE

v.

FELIX HUMBERTO BRIGNONI-PONCE, APPELLANT

JUDGMENT

Appeal from the United States District Court for the Southern District of California.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is

Reversed and Remanded.

A true copy
Attest June 20, 1974.

EMIL E. MELFI, Jr.,
Chief Deputy and Acting Clerk.

RAY HEWITT,
Senior Deputy.

Filed and entered June 14, 1974.

SUPREME COURT OF THE UNITED STATES

No. 74-114

UNITED STATES,
Petitioner,

v.

FELIX HUMBERTO BRIGNONI-PONCE

ORDER ALLOWING CERTIORARI. Filed October 15, 1974

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth ..... Circuit is granted, and the case is set for oral argument in tandem with No. 73-2050 and No. 73-6848.

☆ U.S. Government Printing Office: 1974—563-035/64

FILED
SEP 12 1974
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-114

UNITED STATES OF AMERICA,

PETITIONER,

- vs -

FELIX HUMBERTO BRIGNONI-PONCE,

RESPONDENT.

MOTION FOR LEAVE TO

PROCEED

IN FORMA PAUPERIS

Pursuant to 18 U.S.C. § 3006A(d)(6) and Rule 53 of this Court, the Respondent, Felix Humberto Brignoni-Ponce, asks leave to proceed in forma pauperis without payment of fees and costs. The Respondent was represented by counsel appointed pursuant to 18 U.S.C. § 3006A in the District Court and on appeal to the Ninth Circuit Court of Appeals, and the Government seeks certiorari to review the unanimous judgment of the en banc Ninth Circuit.

Respectfully submitted,

DATED: 10 September 1974.

Frank J. Ragen
Federal Defenders of San Diego, Inc.
325 West "F" Street
San Diego, California 92101
Telephone (714) 234-8467

Attorneys for Respondent

12

FILED
SEP 12 1974
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-114

UNITED STATES OF AMERICA,

PETITIONER,

- vs -

FELIX HUMBERTO BRIGNONI-PONCE,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MEMORANDUM FOR RESPONDENT IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-114

UNITED STATES OF AMERICA, PETITIONER

- vs -

FELIX HUMBERTO BRIGNONI-PONCE

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MEMORANDUM FOR RESPONDENT IN OPPOSITION

During the early evening hours of 11 March 1973 Petitioner was driving a 1969 Chevrolet with two passengers north on Interstate 5 when he was stopped by Border Patrol Agents. The Agents had been parked at a ninety degree angle to the Interstate more than sixty miles from the Mexican border and had observed that the 1969 Chevrolet occupants were Mexican-appearing. The border patrol officers stopped the Chevrolet solely because it contained Mexican-appearing persons. [R.T. 18-19, 21-23] The stop established that the two passengers were aliens unlawfully in the country. [R.T. 24-25, 57-58] 1/

1/ "R.T." refers to the Reporter's Transcript.

The court of appeals, sitting en banc, unanimously rejected the contentions of the Government that the stop of Petitioner was permissible as an exercise of the statutory authority of border patrol agents "to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States" under 8 U.S.C. § 1357(a)(1) and that the stop of Petitioner solely because the vehicle driven by him contained persons who appeared to be of Mexican descent was not inconsistent with or controlled by Almeida-Sanchez v. United States, 413 U.S. 216 (1973). In rejecting the contentions of the Government, the Ninth Circuit declined to follow United States v. Bowman, 487 F.2d 1229 (10th Cir. 1973), where the Tenth Circuit sustained the stop by border patrol agents at a New Mexico immigration checkpoint nearly one hundred miles from the Mexican border as authorized by § 1357(a)(1) and held that Almeida-Sanchez did not challenge "the right of immigration officials to make routine inquiries as to an individual's nationality." 487 F.2d at 1231.

The Tenth Circuit failed to consider the rationale not only of Almeida-Sanchez but also the prior decisions of this Court, none of which authorize the stop of an automobile on less than probable cause. After pointing out that Almeida-Sanchez concluded with the language of Mr. Chief Justice Taft in Carroll v. United States, 267 U.S. 132 (1925) and quoting that language, the court below said:

> "Had the Court intended to leave intact the government's asserted right to stop cars on mere suspicion anywhere in the country in order to interrogate their occupants, as to their right to remain in the United States, we doubt that it would have quoted this language from Carroll. Even more than immigration searches which had to be conducted within an area no more than 100 miles from the border, these immigration stops offend the 'right to free passage without interruption' of 'those lawfully within the country.'" (Pet.App.A at 5a)

Under the Tenth Circuit's interpretation of § 1357(a)(1) border patrol agents may stop vehicles upon mere suspicion anywhere within the United States. See, United States v.

Newman, 490 F.2d 993 (10th Cir. 1974), where the Tenth Circuit said of a border patrol agent stopped a vehicle on the Oklahoma Turnpike more than seven hundred miles from the Mexican border:

> "We do not question the right of a Border Patrol Agent to briefly detain an individual for the purpose of ascertaining his nationality. To this extent Agent Jackson's initial stopping of the appellants' vehicle in the case at bar was, in and of itself, not illegal." 490 F.2d at 995.

To accept the view of the Tenth Circuit is to grant border patrol agents the power to stop vehicles upon mere whim or caprice. It would permit them to apply and administer the law with an evil eye predicated upon skin pigmentation where, as here, they stopped the vehicle solely because its occupants were Mexican-appearing. Such arbitrary and unjustified basis for stopping individuals is as violative of equal protection and due process as the discrimination against race in the issuance of licenses in Yick Wo v. Hopkins, 118 U.S. 356 (1886); the study of law condemned in Gaines v. Canada, 305 U.S. 337 (1938); the discrimination against nationality in jury service rejected in Hernandez v. Texas, 347 U.S. 475 (1954); the discrimination against race in segregated schools overruled in Bolling v. Sharpe, 354 U.S. 497 (1954) and the miscegenation vitiated in Loving v. Virginia, 388 U.S. 1 (1967). To paraphrase Mr. Chief Justice Taft's oft-quoted words in Carroll v. United States, 267 U.S. 125 at 132 (1925):

> "... It would be intolerable and unreasonable if a (border patrol) agent were authorized to stop every automobile (whose occupants were Mexican-appearing) on the chance of finding (illegal aliens) and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a (stop) .... and (their) right to free passage without interruption....

Mexican-appearing fits the description of thousands of American citizens. United States v. Camacho, 468 F.2d 1382, 1383 (9th Cir. 1972), and it is impossible "to determine from looking at a person of Mexican descent whether he is an American citizen, a Mexican national with proper entry papers, or a Mexican alien without papers." United States v. Mallides, 473

F. 2d 859, 860 (9th Cir. 1973). This Court would not sustain a statute prohibiting persons of Mexican descent from securing licenses for operating motor vehicles. To permit immigration officers to restrict or interfere with the movement of vehicles solely because their occupants are Mexican-appearing would contravene the due process clause of the Fifth Amendment and deny such persons equal protection of the law. If § 1357(a)(1) authorized such stops, it would undoubtedly be held unconstitutional by this Court.

However, § 1357(a)(1) is not the source of such omnipotent power, and the Government apparently concedes this when it states:

> "Thus, while an officer need not, for the reasons we have discussed, have probable cause to believe that the automobile's occupants are aliens illegally present in this country-- i.e., that a crime is being committed -- he must reasonably believe that they are aliens." (Pet. at 14) (emphasis provided).

A reasonable belief that occupants of a vehicle are aliens necessarily requires "specific and articulable facts which, taken together with rational inferences from those facts" warrant such belief. Terry v. Ohio, 392 U.S. 1, 21 (1968). Such requirement is no more than the "founded suspicion" test applied by the court below.

Mexican-appearing per se falls short of facts upon which border patrol agents may "reasonably believe" that the Mexican-appearing individual is an alien. Were it otherwise, border patrol agents could "reasonably believe" that the entire citizenry comprising this nation are aliens upon the basis of Irish-appearing, German-appearing, Indian-appearing and dozens of other appearings.

Here, other than the Mexican-appearing,the only facts known to the border patrol agents were that the vehicle was more than sixty miles from the Mexican border proceeding north on Interstate 5. The court below properly held that such facts did not provide a "founded suspicion" for the border patrol

agents to stop the vehicle with its Mexican-appearing occupants. That decision was correct unless § 1357(a)(1) grants border patrol agents absolute authority to stop any and all vehicles anytime and anywhere without the "reasonable suspicion" found necessary for a street detention in Terry v. Ohio, supra.

CONCLUSION

For the foregoing reasons, the Respondent Felix Humberto Brignoni-Ponce respectfully submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,

DATED: 10 September 1974.

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BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (A. 13–17) is reported at 499 F. 2d 1109.

JURISDICTION

The *en banc* judgment of the court of appeals (A. 18) was entered on June 14, 1974. On July 10, 1974, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including August 13, 1974. The petition was filed on that date and was granted on October 15, 1974 (A. 19). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the warrantless stop of an automobile by Border Patrol officers, in order to question persons in the vehicle concerning their right to be or remain in the United States, violates the Fourth Amendment's proscription against unreasonable searches and seizures and requires the suppression of evidence obtained solely as a result of the stop and questioning and not as a result of any subsequent search.

STATUTE AND REGULATION INVOLVED

1. Section 287(a) of the Immigration and Nationality Act, 66 Stat. 233, 8 U.S.C. 1357(a), provides in pertinent part:

> Any officer or employee of the [Immigration and Naturalization] Service authorized under regulations prescribed by the Attorney General shall have power without warrant—
>
> (1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States;
>
> * * * * *
>
> (3) within a reasonable distance from any external boundary of the United States, to board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle, and within a distance of twenty-five miles from any such external boundary to have access to private lands, but not dwellings, for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States; * * *

2. 8 C.F.R. 287.1 provides in pertinent part:

> (a)(2) *Reasonable distance.* The term "reasonable distance," as used in section 287(a)(3) of the Act, means within 100 air miles from any external boundary of the United States or any shorter distance which may be fixed by the district director, or, so far as the power to board and search aircraft is concerned, any distance fixed pursuant to paragraph (b) of this section.
>
> (b) *Reasonable distance; fixing by district directors.* In fixing distances not exceeding 100 air miles pursuant to paragraph (a) of this section, district directors shall take into consideration topography, confluence of arteries of transportation leading from external boundaries, density of population, possible inconvenience to the traveling public, types of conveyances used, and reliable information as to movements of persons effecting illegal entry into the United States: *Provided,* That whenever in the opinion of a district director a distance in his district of more than 100 air miles from any external boundary of the United States would because of unusual circumstances be reasonable, such district director shall forward a complete report with respect to the matter to the Commissioner, who may, if he determines that such action is justified, declare such distance to be reasonable.

STATEMENT

After a jury trial in the United States District Court for the Southern District of California, respondent was convicted on two counts of violating 8 U.S.C. 1324(a)(2), transporting aliens who were

present in this country illegally. He was sentenced to four years' imprisonment on count 1, subject to the immediate parole eligibility provisions of 18 U.S.C. 4208(a)(2), and five years' probation on count 2, to be commenced upon release from confinement or parole (A. 11–12).

1. The evidence at trial established that on March 11, 1973, Border Patrol Agents Brady and Harkins were on duty in a patrol car observing northbound traffic on Interstate Highway 5 approximately four miles south of San Clemente, California (A. 5–6). The officers were parked off the highway at the site of a permanent immigration checkpoint that was closed because of inclement weather and a shortage of manpower (A. 6). The patrol car was parked at a 90-degree angle to the highway with its headlights on, enabling the officers to see the occupants of passing vehicles (A. 6, 9).[1] During the early evening hours, they observed, traveling north, a vehicle driven by respondent and containing two passengers. The officers pursued and stopped the car for a "routine immigration inspection," because they observed that its three occupants appeared to be of Mexican descent (A. 6–9).

Upon questioning the passengers in the vehicle in English and Spanish concerning their citizenship, the

[1] The San Clemente checkpoint, at which the officers were parked, is approximately 62 air miles and 66 road miles north of the Mexican border. *United States* v. *Baca*, 368 F. Supp. 398, 410 (S.D. Cal.). The validity of a warrantless *search* of a vehicle for aliens at that checkpoint, conducted as part of the checkpoint's normal operation, is before this Court in *United States* v. *Ortiz*, No. 73–2050.

officers discovered that they spoke no English and had no papers authorizing them to be in the United States (A. 7). Respondent and the passengers were then arrested (A. 8). At trial, both passengers testified that they were Mexican citizens who had entered the United States illegally (Tr. 24–25, 57, 63–64).

The parties agreed by stipulation that respondent's motion to suppress the evidence derived from the stop of his vehicle could be heard at the time of trial (A. 10). The district court formally denied the motion three months after the trial had ended (*ibid.*).

2. Subsequent to respondent's trial, this Court decided *Almeida-Sanchez* v. *United States*, 413 U.S. 266, which held that a warrantless roving patrol *search* of an automobile for concealed aliens, conducted by Border Patrol officers acting without probable cause or reasonable suspicion to believe that the vehicle contained aliens present in this country unlawfully, violated the Fourth Amendment's proscription against unreasonable searches and seizures. The Ninth Circuit thereafter held that the ruling in *Almeida-Sanchez* should be applied retroactively to require the exclusion of evidence seized in similar roving patrol searches conducted prior to the date of this Court's decision in *Almeida-Sanchez* (*United States* v. *Peltier*, 500 F. 2d 985, certiorari granted, November 11, 1974, No. 73–2000). The Ninth Circuit also held, however, that *Almeida-Sanchez* should apply only prospectively with respect to searches conducted at fixed immigration checkpoints (*United States* v. *Bowen*, 500 F. 2d

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960, certiorari granted, October 15, 1974, No. 73–6848).[2]

In the present case, the court of appeals, sitting *en banc,* reversed respondent's conviction (A. 13–17). It held first that the Border Patrol officers' conduct in pursuing respondent's vehicle and flagging it to the side of the road was "more characteristic of a roving-patrol stop than of a fixed-checkpoint stop" (A. 14). The court therefore determined, pursuant to its prior decision in *Peltier,* that the principles of *Almeida-Sanchez* were applicable even though the stop occurred prior to this Court's decision in that case (*ibid.*).

The court next held that warrantless *stops* of vehicles, "without probable cause, and without even a reasonable suspicion that any of the occupants are illegal aliens [,] * * * are entirely inconsistent with the Supreme Court's opinion in *Almeida-Sanchez*" (A. 15). The court of appeals acknowledged that *Almeida-Sanchez* involved a search rather than only a stop and that 8 U.S.C. 1357(a) gives Border Patrol officers authority not only to search vehicles for concealed aliens without a warrant but also "to interrogate any alien or person believed to be an alien as to his right to be or remain in the United States * * *."

[2] The Ninth Circuit had first held in *Bowen* that *Almeida-Sanchez* should be extended to invalidate warrantless searches of automobiles for aliens at fixed checkpoints. We argue in *Bowen* and in *United States* v. *Ortiz*, No. 73–2050, that warrants should not be required for checkpoint searches of vehicles for concealed aliens and that, even if warrants are required, the ruling should not apply in the Ninth Circuit to checkpoint searches that occurred prior to that court's decision in *Bowen.*

The court reasoned, however, that this Court's opinion in *Almeida-Sanchez* "reflects at least as much concern with the initial stop as with the subsequent search" (A. 15).

The court concluded that a warrantless stop of a vehicle is permissible only if the officers have information that creates "a founded suspicion" that one or more occupants of the vehicle are aliens whose presence in this country is unlawful (A. 17). Although not disputing that the officers here had reason to believe that respondent and his passengers were aliens, the court held that they "did not possess facts which constituted a founded suspicion that [respondent] or his passengers were *illegal* aliens" (*ibid.;* emphasis added). The court therefore concluded that "the stop and interrogation * * * were illegal, and the fruits of the illegal conduct were inadmissible" (*ibid.*).

The court refused to "adopt the approach taken by our brothers on the Tenth Circuit" (A. 15) in *United States* v. *Bowman,* 487 F. 2d 1229, in which that court held that the stopping of an automobile "for the limited purpose of determining [the driver's] citizenship was entirely justified" under 8 U.S.C. 1357(a)(1) and is not barred by the Fourth Amendment or by the principles of *Almeida-Sanchez* (487 F. 2d at 1231).

ARGUMENT

BORDER PATROL OFFICERS MAY, WITHOUT A WARRANT, LAWFULLY STOP A VEHICLE IN THE AREA OF THE MEXICAN BORDER TO QUESTION THE OCCUPANTS CONCERNING THEIR RIGHT TO BE OR REMAIN IN THE UNITED STATES

A. INTRODUCTION AND SUMMARY

This case is similar to *Almeida-Sanchez* insofar as both involve roving patrol operations [3] in the Mexican border area, conducted as part of the Border Patrol's overall program to enforce the Nation's immigration laws. The present case differs from *Almeida-Sanchez*, however, in one important respect. Whereas the marihuana that formed the basis of the prosecution in *Almeida-Sanchez* was discovered under the back seat of the defendant's automobile in the course of a search for concealed aliens, the evidence that was held inadmissible by the court of appeals in the present case was derived solely from "the stop and interrogation of Brignoni-Ponce and the passengers in his car" (A. 17). There is no contention that any evidence introduced at respondent's trial was the fruit of an unlawful search of his automobile.

The only question presented here, therefore, is whether the warrantless roving patrol stop of respondent's vehicle by Border Patrol officers, in order

[3] The court of appeals in the present case, recognizing that "the line between a roving-patrol stop and fixed-checkpoint stop is not a clear one," concluded that "pursuing a passing car and flagging it to the side of the road is conduct more characteristic of a roving-patrol stop than of a fixed-checkpoint stop" (A. 14). Though we think the question is a close one, we do not here dispute the court's conclusion.

to question the vehicle's occupants concerning their right to be or remain in the United States, violated the Fourth Amendment and requires suppression of the evidence derived therefrom.[4]

Two inquiries are necessary to determine the lawfulness of the stop. First, what is the nature and quantum of cause necessary, in the area of the Mexican border, to justify a stop of a car and an inquiry into the citizenship status of its occupants? Second, may such a stop properly be made without advance judicial approval through the warrant procedure?

Looking first to the question of cause, we argue in this brief that the stop of respondent's automobile was properly predicated upon an area-wide equivalent of probable cause that would have justified not merely a brief stop for interrogation but even a limited search of the vehicle for aliens. Because of the unique conditions and difficult law enforcement problems in the Mexican border areas, it may be reasonable to

[4] The stop of respondent's vehicle occurred prior to this Court's decision in *Almeida-Sanchez*. In *United States* v. *Peltier*, No. 73-2000, we argue that *Almeida-Sanchez* should not be applied retroactively to exclude evidence discovered as a result of a warrantless roving patrol stop and search conducted prior to *Almeida-Sanchez*. If the Court agrees with our contention in *Peltier*, we assume that the exclusionary rule would also be inapplicable to a pre-*Almeida-Sanchez* stop for interrogation *without* a search. We do not urge the nonretroactivity of *Almeida-Sanchez* as a ground for reversal here, however, because respondent's case was the vehicle for an extension of *Almeida-Sanchez* by the Ninth Circuit. If this Court holds that warrantless stops are unlawful, then we would agree, in line with our position in *United States* v. *Ortiz*, No. 73-2050, and *Bowen* v. *United States*, No. 73-6848, that respondent should be given the benefit of that new rule.

stop a vehicle to ask the occupants about their right to be or remain in this country even though the officers lack an articulable suspicion that the particular vehicle to be stopped contains illegal aliens.

Turning to the warrant issue, we then argue that advance judicial approval of such a stop through the warrant procedure is not necessary to ensure the reasonableness of so brief and limited an interference with the privacy interests of the traveling public. Although Mr. Justice Powell concluded in *Almeida-Sanchez* that an area warrant was required to justify a roving patrol *search* of a vehicle for aliens, a brief stop for questioning, which ordinarily takes less than a minute and requires no more of the occupants than a response to one or two questions and possibly the production of an immigration document, is a far less drastic intrusion than a search of the vehicle for aliens. In view of the important governmental interest in making such stops, the difficulty of adapting most roving patrol operations to an area warrant procedure, and the limited scope of the resulting interference with highway travel, a routine investigative stop in the border area, made by Border Patrol officers pursuant to express statutory authority, is not an unreasonable seizure under the Fourth Amendment even though conducted without an area warrant.

B. THERE EXISTS AN AREA-WIDE EQUIVALENT OF PROBABLE CAUSE THAT JUSTIFIES A BRIEF STOP OF A VEHICLE IN THE MEXICAN BORDER AREA TO INQUIRE ABOUT THE CITIZENSHIP OF ITS OCCUPANTS

1. The decision of the court of appeals rests upon a fundamental misconception concerning the nature of

the cause necessary to justify a stop of a vehicle in the border areas. The court held that the investigating officers must "possess facts" amounting to "a founded suspicion" that the particular vehicle to be stopped contains aliens illegally present in this country (A. 17).

It is true that in the usual case the permissible reason for a search or seizure must be focused with particularity upon the person or object to be searched or seized. But this Court has recognized that the probable cause requirement may be satisfied in some circumstances by knowledge of conditions in an "area as a whole" rather than by "specific knowledge" with respect to the particular object of a search (*Camara* v. *Municipal Court*, 387 U.S. 523, 536, 538).

Camara involved a city-wide program of routine and periodic building inspections to identify housing code violations. This Court ruled that the constitutionality of any particular inspection turned not upon the existence of probable cause to believe that a violation would be uncovered in the particular building to be inspected, but upon the reasonableness of the inspection program itself. "[T]he agency's decision to conduct an area inspection is unavoidably based on its appraisal of conditions in the area as a whole, not on its knowledge of conditions in each particular building" (387 U.S. at 536). The Court held that, if entry to a particular building were refused, a warrant could be issued on the basis of this area-wide probable cause, "if reasonable legislative or administrative standards for conducting an area inspection are satis-

fied with respect to a particular dwelling" (*id.* at 538). See also *Colonnade Catering Corp.* v. *United States,* 397 U.S. 72; *United States* v. *Biswell,* 406 U.S. 311.

We argued in *Almeida-Sanchez* that the Border Patrol's traffic checking procedures in the area of the Mexican border were essential to the effective enforcement of this country's immigration laws and that roving patrol searches could be justified on the basis of an area-wide probable cause like that in *Camara.* Though the Court held that such searches could not, in any event, be deemed reasonable in the absence of a warrant, the majority opinion did not reject the applicability of area-wide probable cause in this context, and both Mr. Justice Powell's concurring opinion and Mr. Justice White's dissenting opinion (joined by the Chief Justice and Justices Blackmun and Rehnquist) agreed that the probable cause principles of *Camara* may be applicable to the Border Patrol's roving patrol search operations.

Mr. Justice Powell stated that "under appropriate limiting circumstances there may exist a constitutionally adequate equivalent of probable cause to conduct roving vehicular searches in border areas" (413 U.S. at 279). Because many illegal entrants "cross the border on foot, or at places other than established [border] checkpoints, it is simply not possible in most cases for the Government to obtain specific knowledge that a person riding or stowed in an automobile is an alien illegally in the country" (*id.* at 276–277). "[O]n appropriate facts," however, "the Government can

satisfy the probable cause requirement for a roving search in a border area without possessing information about particular automobiles" (*id.* at 281).[3]

As we show in our brief in *United States* v. *Ortiz,* No. 73–2050, pp. 20–32, the factors that persuaded Mr. Justice Powell that roving patrol searches could be justified in the border areas on the basis of this area-wide "functional equivalent of probable cause" (413 U.S. at 277) are at least as strong today as they were at the time of the decision in *Almeida-Sanchez.* There is no need to repeat here what we said in our brief in *Almeida-Sanchez* and what we reiterated in our brief in *Ortiz.* It is enough to say that the high concentration of illegal aliens in the Mexican border area, the absence of any reasonable law enforcement alternative to conducting roving patrol searches, and the consistent judicial approval of such searches prior to *Almeida-Sanchez* combine to justify, on an area-wide basis, the modest intrusion caused by a limited roving patrol search of a vehicle for aliens. Though a warrant is required for such a search under *Almeida-Sanchez,* it may be issued without a showing that there

[3] Mr. Justice Powell concluded, however, that a warrant should be required for such searches. The dissenting Justices, though disputing the need for a warrant, agreed that area-wide probable cause would satisfy the Fourth Amendment's requirements for issuance of warrants. Mr. Justice White stated: "[A]t least one Justice, Mr. Justice Powell, would uphold searches by roving patrols if authorized by an area warrant issued on less than probable cause in the traditional sense. I agree with Mr. Justice Powell that such a warrant so issued would satisfy the Fourth Amendment, and I expect such warrants would be readily issued" (413 U.S. at 288).

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is reason to believe that any particular vehicle is carrying a concealed alien.

The present case involves only a brief stop of a vehicle to question its occupants concerning their right to be or remain in the United States, and this Court has held that an investigative stop by a law enforcement officer may be justified on less than probable cause. "[A] police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." *Terry* v. *Ohio,* 392 U.S. 1, 22; see also *Adams* v. *Williams,* 407 U.S. 143.

When *Terry* is read together with *Camara* and the concurring and dissenting opinions in *Almeida-Sanchez,* this is what emerges. An investigative stop of an automobile to inquire into the citizenship status of its occupants may be made on the basis of reasonable suspicion not amounting to probable cause, but that suspicion, like the probable cause in *Camara,* need not be focused with particularity on the specific vehicle to be stopped. It may be based, instead, upon knowledge of conditions in the area as a whole. The conditions in border areas are such that investigative roving patrol stops, like the more intrusive roving patrol searches, are essential to the effective enforcement of the immigration laws.[6] Since those conditions may

[6] "[I]f immigration authorities were unable to question aliens as to their right to be in this country without some independent evidence that they were here illegally, their job would be impossible." *United States* v. *Montez-Hernandez,* 291 F. Supp. 712, 715 (E.D. Cal.).

provide "a constitutionally adequate equivalent of probable cause" (413 U.S. at 279) to conduct a roving patrol search, it follows *a fortiori* that the same conditions may constitute sufficient cause to conduct a far less intrusive stop for questioning.

We submit, therefore, that the court of appeals erred in holding that the Fourth Amendment could be satisfied only upon the basis of particularized suspicion with respect to each vehicle stopped. Putting aside for a moment the question whether a warrant is required, it is our submission that the same area-wide equivalent of probable cause that at least five Justices thought could justify a roving patrol search in *Almeida-Sanchez* also may justify the lesser intrusion involved in a brief investigative stop.

Prior to this Court's decision in *Almeida-Sanchez,* the courts of appeals had uniformly upheld investigative stops of vehicles in the Mexican border areas without requiring particularized suspicion. *E.g., Ramirez* v. *United States,* 263 F. 2d 385 (C.A. 5); *Contreras* v. *United States,* 291 F. 2d 63 (C.A. 9); *Fernandez* v. *United States,* 321 F. 2d 283 (C.A. 9); *United States* v. *Campos,* 471 F. 2d 296 (C.A. 9); *United States* v. *Saldana,* 453 F. 2d 352 (C.A. 10); *Roa-Rodriquez* v. *United States,* 410 F. 2d 1206 (C.A. 10).[7] Even after *Almeida-Sanchez,* the Tenth Circuit

[7] In many cases in which the courts considered the legality of a search of a vehicle, the lawfulness of the initial stop was unquestioned. See, *e.g., United States* v. *Wright,* 476 F. 2d 1027 (C.A. 5), certiorari denied, 414 U.S. 821; *United States* v. *McDaniel,* 463 F. 2d 129 (C.A. 5), certiorari denied, 413 U.S. 919; *United States* v. *Marin,* 444 F. 2d 86 (C.A. 9); *Fumagalli* v. *United States,* 429 F. 2d 1011 (C.A. 9); *United States* v.

adhered to its view that the Fourth Amendment is not violated when Border Patrol officers, without a warrant, stop a vehicle "to make routine inquiries as to an individual's nationality" (*United States* v. *Bowman, supra,* 487 F. 2d at 1231).[7]

2. A word should be said, however, about the relationship between what the Fourth Amendment may tolerate on the one hand and what the Immigration and Nationality Act may authorize on the other hand.

Arey, 428 F. 2d 1159 (C.A. 9), certiorari denied, 400 U.S. 903; *United States* v. *Miranda*, 426 F. 2d 283 (C.A. 9); *United States* v. *McCormick*, 468 F. 2d 68 (C.A. 10), certiorari denied, 410 U.S. 927.

Outside the border areas, and in the context of personal encounters rather than highway stops, some courts have applied different rules. In the District of Columbia Circuit, for example, "forcible detentions of a temporary nature for purposes of interrogation" were permitted "under circumstances creating a reasonable suspicion, not arising to the level of probable cause to arrest, that the individual so detained is *illegally* in the country." *Au Yi Lau* v. *Immigration and Naturalization Service*, 445 F. 2d 217, 223 (emphasis added); see also *Yam Sang Kwai* v. *Immigration and Naturalization Service*, 411 F. 2d 683 (C.A. D.C.); *Cheung Tin Wong* v. *Immigration and Naturalization Service*, 468 F. 2d 1123 (C.A. D.C.); *United States* v. *Cho Po Sun*, 409 F. 2d 489 (C.A. 2), certiorari denied, 396 U.S. 864. Though we do not necessarily agree that the D.C. Circuit's standard is correct, we note that the conditions that give rise to area-wide probable cause in the border areas may not be present in other locations.

[8] See also *United States* v. *Newman*, 490 F. 2d 993, 995 (C.A. 10). The Fifth Circuit has not had occasion to decide the question since the decision in *Almeida-Sanchez*. One panel, however, expressed "serious doubt" as to the continued validity of warrantless stops for interrogation. *United States* v. *Rodriguez-Hernandez*, 493 F. 2d 168, 169, pending on petition for a writ of certiorari, No. 73-6851.

Section 287(a) of the Act, 8 U.S.C. 1357(a), gives Border Patrol officers the "power without warrant—(1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States [and] * * * (3) within a reasonable distance from any external boundary of the United States, to board and search for aliens any * * * vehicle * * *." The term "reasonable distance" as used in subsection (3) is defined by 8 C.F.R. 287.1(a)(2) as "within 100 air miles from any external boundary of the United States * * *."

The search authority conferred by subsection (3) is not conditioned upon the existence of any particularized knowledge. The Border Patrol is authorized to search "*any* vehicle" (emphasis added). That authority may be exercised, however, only within a reasonable distance from an external boundary, and the scope of the search power is limited to places in a vehicle where a human being could reasonably be concealed.[9] Obviously, the power conferred by subsection (3) to conduct a limited search of any vehicle in the border area necessarily comprehends the power to *stop* any vehicle in that area and to ask questions of its occupants to determine whether the vehicle contains concealed aliens.

The interrogation authority conferred by subsection (1), unlike the search authority conferred by subsection (3), is not limited to a reasonable distance

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[9] As we indicated in our brief in *Ortiz* (p. 29), an automobile inspection is usually limited to a brief look in the trunk but occasionally extends to a look under the hood, beneath the chassis, or behind the back seat.

from an external boundary. Its exercise, however, is conditioned upon the existence of some particularized knowledge concerning the person to be questioned. He must be an "alien or person believed to be an alien * * *." Moreover, the questioning under subsection (1) may extend only to the person's "right to be or to remain in the United States."

Thus, when the two subsections are read together, they authorize the Border Patrol to conduct the following investigative activity without a warrant. Within a reasonable distance from an external boundary, officers may stop *any* vehicle, may question its occupants concerning both their right to be in the United States and the possibility that aliens may be concealed in the vehicle, and may search the vehicle for aliens. Outside a reasonable distance from an external boundary, Border Patrol officers may stop only those vehicles containing persons whom the officers believe to be aliens, may question those persons only as to their right to be or to remain in the United States, and may search a vehicle only upon particularized probable cause.

The statute represents the considered judgment of Congress that the measures it authorizes are essential to the effective enforcement of the immigration laws and consistent with the reasonableness standard of the Fourth Amendment. *Almeida-Sanchez* v. *United States, supra,* 413 U.S. at 291, 293 (Mr. Justice White dissenting). That judgment is entitled to considerable respect. See *United States* v. *Biswell, supra,* 406 U.S. at 315–317; *Colonnade Catering Corp.* v. *United States, supra,* 397 U.S. at 76. Insofar as the

judgment is incorrect, however, the authority conferred by the statute is ultimately circumscribed by the Fourth Amendment, for "[i]t is clear * * * that no Act of Congress can authorize a violation of the Constitution" (*Almeida-Sanchez* v. *United States, supra,* 413 U.S. at 272).

Thus, in *Almeida-Sanchez* this Court held that a roving patrol search conducted without a warrant pursuant to the authority conferred by subsection (3) nevertheless violated the Fourth Amendment. And we acknowledged in *Almeida-Sanchez* that routine searches of vehicles for aliens in Times Square would be "unreasonable" in the constitutional sense, even though it is technically within a "reasonable distance" of an external boundary as that term is defined by the regulation. The conditions in New York City would not provide an area-wide equivalent of probable cause sufficient to justify the practice of conducting such searches.[10]

But even if a statute authorizes law enforcement conduct that might in some circumstances be regarded as unreasonable under the Fourth Amendment, that does not mean that the authorized conduct must be viewed as unreasonable in *all* circumstances. It may be, for example, that a Border Patrol law enforce-

[10] The Immigration and Naturalization Service, of course, has never claimed or exercised any authority to conduct such searches in New York or similar places. The Border Patrol has conducted routine searches of vehicles for aliens only in the area of this country's border with Mexico, where illegal entry is a serious problem and where the concentration of illegal entrants is high, and occasionally in the area of the Canadian border when seasonal and other circumstances lead to increased border-crossing violations.

ment method apparently authorized by statute would be unreasonable if used in Times Square but quite reasonable if used near El Paso, Texas, a mile or two from the Mexican border. The official conduct should not be regarded as unconstitutional when it occurs in El Paso simply because it might be unconstitutional if it occurred in New York.

The Border Patrol officers in the present case were observing traffic in a patrol car at the closed San Clemente checkpoint, located in an area known to have a high incidence of illegal alien traffic. The checkpoint "straddles a natural corridor along which illegal aliens frequently travel in their migration towards the labor markets in the north," and it has been described as "the primary, or cornerstone, checkpoint maintained by the Border Patrol" in southern California (*United States* v. *Baca*, 368 F. Supp. 398, 410, 415 (S.D. Cal.)). More than 12,000 deportable aliens were apprehended at the checkpoint in fiscal year 1973, and in normal operation it is common for an eight-hour shift to result in as many as 20 or 30 apprehensions (*id.* at 410).

Against this background, it is not difficult to understand why Border Patrol Agents Brady and Harkins acted as they did when they observed respondent's northbound vehicle pass the checkpoint containing three persons who appeared to be of Mexican descent. Though the officers had no particularized suspicion that those individuals were illegally present in the country, the circumstances made it appropriate to stop the vehicle briefly to inquire whether they were citizens of the United States or had a right to be here. We

contend that this minimally intrusive conduct was authorized by both subsections of 8 U.S.C. 1357(a) and that it was reasonable under the Fourth Amendment—putting aside, again, the question whether a warrant was required—because it was predicated upon an area-wide equivalent of probable cause or reasonable suspicion.

The authority conferred by subsection (1) of the statute is not limited to exercise within a reasonable distance from an external boundary, and it is true that we read that subsection, in the court of appeals' words, as permitting "immigration officials [to] stop a vehicle anywhere in the country in order to interrogate its occupants as to their right to be in the United States, without a warrant, without probable cause, and without even a reasonable suspicion that any of the occupants are illegal aliens" (A. 15). But there is no need to consider in *this* case whether there would have been sufficient cause to make a similar stop for questioning in Omaha, Nebraska, or Nashville, Tennessee.

It may be that outside the Mexican border area there would be no comparable "functional equivalent of probable cause" to justify the kind of stop that was made here, even though subsection (1) would appear to authorize it. The only question to be answered in this case, however, is whether such area-wide probable cause exists in the border region where respondent's vehicle was in fact stopped. If, as we have shown, there was sufficient area-wide cause to justify the stop involved here, then it should not

matter whether sufficient cause would exist to make a similar stop elsewhere.[11]

C. ADVANCE JUDICIAL APPROVAL THROUGH THE WARRANT PROCEDURE IS NOT NECESSARY TO ENSURE THE REASONABLENESS OF A BRIEF INVESTIGATIVE STOP OF A VEHICLE

If, as we have shown, the Border Patrol officers had sufficient cause to stop respondent's vehicle in order to inquire about the citizenship status of its occupants, there remains the question—which the court of appeals did not address—whether advance judicial approval in the form of an area warrant, required by this Court for a roving patrol *search* in *Almeida-Sanchez,* should also be required for the kind of brief roving patrol stop and questioning that took place in this case.[12]

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[11] Similarly, although we believe that Border Patrol officers may, under 8 U.S.C. 1357(a)(3), lawfully make routine vehicle stops *in the border areas* even when they do not have reason to believe that the occupants of the vehicle may be aliens, that issue need not be decided in this case. Border Patrol Agent Brady testified that respondent's vehicle was stopped because the people in the car appeared to be of Mexican descent (A. 9). All that must be decided here, therefore, is whether the authority conferred by subsection (1) to interrogate persons believed to be aliens may be exercised by stopping vehicles containing such persons for brief questioning within the Mexican border areas.

[12] The Ninth Circuit has held that the particularized suspicion requirement for roving patrol stops that was announced in this case extends also to stops at fixed checkpoints in the course of their normal operation. *United States* v. *Esquer-Rivera*, Nos. 74–1110, *et al.*, decided July 1, 1974. If this Court agrees with our contention in *Ortiz* that searches of vehicles for aliens may be conducted at fixed checkpoints routinely and without a warrant, it would follow that stops for questioning at such checkpoints may also be made routinely and without a warrant. But even if the Court holds that warrants are required for checkpoint searches, we would argue that warrants are not required for brief stops for questioning at checkpoints. Our analysis here with respect to roving patrol stops would apply as well to checkpoint stops.

Our contention can be stated quite simply. The "seizure" involved in this case was so limited an intrusion into the privacy interests protected by the Fourth Amendment that the interposition of a magistrate was unnecessary to ensure its reasonableness.[13] Just as the nature of the cause necessary to justify a particular search or seizure depends in part upon the extent of the intrusion contemplated (*Terry* v. *Ohio,* 392 U.S. 1, 17–18, n. 15), so should the need for a warrant turn in part upon the scope of the official interference with protected interests.

This is so because "[t]he ultimate standard set forth in the Fourth Amendment is reasonableness" (*Cady* v. *Dombrowski,* 413 U.S. 433, 439). Although "both the concept of probable cause and the requirement of a warrant bear on the reasonableness of a search" or seizure (*Almeida-Sanchez* v. *United States, supra,* 413 U.S. at 277, Mr. Justice Powell concurring), there are some circumstances in which a search or seizure may be reasonable without a warrant or without probable cause or even without both (*ibid.*). This is "the central inquiry under the Fourth Amendment—the reasonableness in all the circumstances of

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[13] We acknowledge that even a brief stop of a vehicle to make a limited inquiry about a person's nationality may be a sufficient interference with an individual's "personal security" to constitute a "seizure" under the Fourth Amendment (*Terry* v. *Ohio*, *supra*, 392 U.S. at 19 and n. 16).

the particular governmental invasion of a citizen's personal security" (*Terry* v. *Ohio, supra,* 392 U.S. at 19).

The absence of a warrant for a particular search or seizure may raise warning signals, but whether that absence makes the search or seizure unreasonable depends at least in part upon the nature and scope of the intrusion.[14] For example, "broad and unsuspected governmental incursions into conversational privacy [through] electronic surveillance" may "jeopard[ize] * * * constitutionally protected speech" and, particularly when directed against "those suspected of unorthodoxy in their political beliefs," may make "Fourth Amendment protections * * * the more necessary" (*United States* v. *United States District Court,* 407 U.S. 297, 313–314). The magnitude of "the potential danger posed by unreasonable surveillance to individual privacy and free expression" (*id.* at 315) heightens the "risk" involved in relying solely on "unreviewed executive discretion" as a guarantee of reasonableness (*id.* at 317). In those circumstances, this Court concluded that "the needs of citizens for privacy and free expression may * * * be better protected by requiring a warrant before such surveillance is undertaken" (*id.* at 315).

When law enforcement officers use less "constitutionally sensitive means in pursuing their tasks" (*id.*

[14] The test in these cases, as this Court has held, is "not whether it was reasonable to procure a search warrant, but whether the search itself was reasonable." *United States* v. *Edwards,* 415 U.S. 800, 807; see *Cooper* v. *California,* 386 U.S. 58, 62.

at 317), however, a warrant may not always be required. An on-the-street investigative stop of a suspicious individual and a frisk of his person for concealed weapons may be conducted by a law enforcement officer without a warrant (*Terry* v. *Ohio, supra*).[15] Similarly, four members of this Court concluded in *Cardwell* v. *Lewis,* No. 72–1603, decided June 17, 1974, that the scraping of paint from the exterior of an automobile did not "invade * * * a right to privacy which the interposition of a warrant requirement is meant to protect" (slip op. 5, plurality opinion).

The brief stop of a vehicle in the border area to ask its occupants a few questions about their citizenship and right to be in the United States, while not trivial, does not constitute the kind of instrusion into protected privacy interests that was involved in even the limited search for aliens conducted in *Almeida-Sanchez.* The Immigration and Naturalization Service informs us that a stop for questioning at a checkpoint ordinarily takes no more than about 5 seconds per occupant and that even a roving patrol stop for questioning usually consumes no more than a minute. Such stops involve no search unless the officers have particularized probable cause. All that is required of the vehicle's occupants is a response to a brief question or two and possibly the production of a document evidencing a right to be in the United States.

[15] Of course, in the *Terry* context no warrant could have been obtained, since there was neither area probable cause nor individualized probable cause.

We submit that this momentary verbal encounter does not present the sort of dangers that a warrant is designed to protect against. In contrast to the situation as viewed by the majority in *Almeida-Sanchez,* there is here no claim of an "extravagant license to search" (413 U.S. at 268). A brief stop for questioning is a far less "constitutionally sensitive" (*United States* v. *United States District Court, supra,* 407 U.S. at 317) law enforcement method than a stop and search, and we believe that the need for and utility of advance judicial approval are correspondingly reduced.

Moreover, roving patrol operations are not easily adapted to an area warrant procedure. Roving patrol traffic checking operations are considered by the Border Patrol to be essential to supplement the fixed checkpoints as part of an overall program to deter illegal entry and apprehend illegal entrants. Although the need for som roving patrols—to cover one or two roads that bypass a major fixed checkpoint, for example—may be sufficiently foreseeable to permit advance planning, most roving patrol traffic checking operations can be employed effectively only if they can be used flexibly.

Basic roving patrol strategy is established on a regional basis, but the deployment of particular patrol cars and agents is ordinarily determined by field supervisors, who must take account of such variable factors as the season, the weather, the traffic flow, the time of day, manpower and patrol car availability, recent experience on a road or roads, information con-

cerning illegal activity, and so on. In areas with many bypass roads, one patrol car may be assigned to cover 10 or more roads and many square miles during a single shift.

For these reasons, the need for and assignment of roving patrols ordinarily cannot be anticipated for a future period but must be determined on a day-to-day basis consistent with regional policy.[16] Weekly or monthly warrants would therefore not be feasible. The Border Patrol has found that it would be impractical to seek daily warrants for each patrol car, in part because that would require an inordinate commitment of resources to the preparation of information to be presented in support of warrant applications. After this Court's decision in *Almeida-Sanchez,* therefore, the Border Patrol effectively discontinued the use of roving patrol traffic checking operations except when specific information was obtained concerning possible smuggling operations.

Even if these practical problems were not considered sufficiently disruptive of the Border Patrol's enforcement program to justify a roving patrol *search* without a warrant,[17] we submit that the balance of reasonableness shifts when the contemplated intrusion is limited to a brief investigative stop. The

[16] The instant case is illustrative of the problem. The "roving patrol" operation here involved was in response to immediate and unanticipated weather and manpower exigencies.

[17] Mr. Justice Powell stated in *Almeida-Sanchez* that "the roving searches are apparently planned in advance or carried out according to a predetermined schedule" (413 U.S. at 283). As we have indicated, that is true only with respect to a minority of roving patrol traffic checking operations.

result here should reflect the substantial difference between the intrusiveness of a search and the intrusiveness of a momentary "seizure."[18]

The situation here, we submit, is similar to that in *United States* v. *Biswell, supra,* where this Court upheld as "reasonable official conduct under the Fourth Amendment" (406 U.S. at 316) a warrantless search of a federally licensed firearms dealer's locked storeroom, conducted pursuant to an inspection program that was authorized by statute. Although, as Mr. Justice Powell stated in *Almeida-Sanchez,* "[o]ne who merely travels in regions near the borders of the country can hardly be thought to have submitted to inspections in exchange for a special perquisite" (413 U.S. at 281), drivers and motor vehicles are licensed by the states, and the lower federal courts have upheld routine warrantless stops of vehicles for license and registration checks.[19] A roving patrol immigration

[18] One district court aptly stated: "It cannot be considered an arbitrary invasion of privacy merely to ask for proper identification in an area known to contain large numbers of illegal Mexican aliens, particularly when the person being questioned gives the appearance of being nervous and being of Mexican ancestry. This is especially true when it is the only feasible way to apprehend the seemingly endless parade of aliens who escape detection at the border" (*United States* v. *Montez-Hernandez, supra,* 291 F. Supp. at 716).

[19] See, *e.g., United States* v. *Croft,* 429 F. 2d 884 (C.A. 10); *Myricks* v. *United States,* 370 F. 2d 901 (C.A. 5), certiorari denied, 386 U.S. 1015; *Lipton* v. *United States,* 348 F. 2d 591 (C.A. 9). See generally Note, *Automobile License Checks and the Fourth Amendment,* 60 Virginia L. Rev. 666 (1974); Comment, *Freedom of the Road: Public Safety* v. *Private Right,* 14 DePaul L. Rev. 381, 407–409 (1965); Comment, *Interference with the Right to Free Movement: Stopping and Search of Vehicles,* 51 Calif. L. Rev. 907 (1963); Note, *Random Road Blocks and the Law of Search and Seizure,* 46 Iowa L. Rev. 802 (1961); Note, *The Driver's License "Display" Statute: Problems Arising from Its Application,* 1960 Wash. U.L.Q. 279.

stop, though not part of any state highway safety inspection program, is no more intrusive than the routine license check with which most motorists are familiar.

Moreover, as in *Biswell,* "the prerequisite of a warrant could easily frustrate" the enforcement scheme; "and if the necessary flexibility * * * is to be preserved, the protections afforded by a warrant would be negligible" (406 U.S. at 316). Warrantless roving patrol investigative stops, like the unannounced inspections of firearms dealers in *Biswell,* are specifically authorized by statute. The Court's conclusion in *Biswell* thus bears as well upon the resolution of the issue here. The Court there had "little difficulty in concluding that where * * * regulatory inspections further urgent federal interests, and the possibilities of abuse and the threat to privacy are not of impressive dimensions, the inspection may proceed without a warrant where specifically authorized by statute" (*id.* at 317).

Although immigration stops may not be "regulatory inspections" in furtherance of a licensing scheme, they involve a far less drastic intrusion than the unannounced searches sanctioned in *Biswell.* "[T]he possibilities of abuse and the threat to privacy" are of even less "impressive dimensions" in this context than in *Biswell* (*ibid.*).

Taking into account that "Congress has broad

authority to fashion standards of reasonableness for searches and seizures" (*Colonnade Catering Corp.* v. *United States, supra,* 397 U.S. at 77), we believe that Border Patrol officers may lawfully exercise their express statutory authority to make brief vehicle stops without warrants to inquire about the citizenship of the occupants. These limited intrusions do not pose the kind of dangers that might make it necessary to disregard the congressional judgment that warrants are not needed to ensure the reasonableness of the law enforcement conduct.

In arguing that a roving patrol investigative stop is not *per se* unreasonable if made without a warrant, we do not mean to suggest that an aggrieved person may not allege and prove in a particular factual setting that the stop of his automobile was in fact unreasonable or that the manner and scope of the officers' subsequent questioning were unlawful. We do say, however, that the Fourth Amendment values at stake are adequately protected when these claims are adjudicated *after* the stop and questioning and in the context of an adversary proceeding on specific facts.

As we showed earlier (pp. 20–21, *supra*), the stop and questioning in this case were authorized by 8 U.S.C. 1357(a)(1) and (3) and were reasonable under the Fourth Amendment. Border Patrol Agents Brady and Harkins were observing traffic on a highway frequently used to transport illegal entrants, at the site of the closed San Clemente checkpoint where thousands of illegal entrants are apprehended each

year. When they observed respondent's northbound vehicle containing three persons who appeared to be of Mexican descent, they were justified in stopping the car to question its occupants about their citizenship and their right to be in the United States. Once the vehicle was lawfully stopped, the officers' brief questioning of the passengers revealed that they were present in this country illegally.

We submit that this law enforcement action "was justified at its inception" and "reasonably related in scope to the circumstances which justified the interference in the first place" (*Terry* v. *Ohio, supra,* 392 U.S. at 20). The limited "seizure" of which respondent complains was not "unreasonable" under the Fourth Amendment.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA,
Petitioner,

v.

FELIX HUMBERTO BRIGNONI-PONCE,
Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-114

UNITED STATES OF AMERICA,
Petitioner,

v.

FELIX HUMBERTO BRIGNONI-PONCE,
Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

QUESTIONS PRESENTED

I.

Whether consistent with the Fourth Amendment armed Border Patrol officers operating as a roving

patrol have the right to forcibly stop a vehicle travelling on an interstate highway 60 miles from an international border and to interrogate its occupants absent probable cause, a warrant, or founded suspicion?

II.

Whether the stop of respondent's vehicle and subjection of the occupants to interrogation solely because the occupants appeared to be of Mexican descent violated the Fourth and Fifth Amendments?[1]

STATEMENT OF THE CASE

Facts

During the hours of darkness on 11 March 1973 somewhere near the San Clemente Border Patrol checkpoint, located midway between San Diego and Los Angeles, Border Patrol Agents Brady and Harkins were sitting in a vehicle observing northbound traffic on Interstate Highway 5. (A.[2] 5-7). Their vehicle was at a ninety-degree angle to the highway with the headlights turned on to shine in the cars that passed. (A. 9). The

[1] This was the principal issue presented by the respondent to the Court of Appeals, No. 73-2161 Brief for Appellant, p. 1. Respondent may urge other distinct grounds in support of the judgment of the Circuit Court of Appeals. *United States v. Ballard*, 322 U.S. 78, 88 (1944). See also Stern and Gressman, *Supreme Court Practice*, 314-315 (4th ed. 1969).

[2] "A." refers to Appendix. "Tr." refers to the Trial Transcript. "R." refers to Clerk's Record or official papers.

officers, observing that the people inside the respondent's car appeared to be of Mexican descent, pursued the respondent's vehicle and stopped it. (A. 7, 9). The sole basis for the stop, according to the agents, was that the occupants appeared to be of Mexican descent. (A. 9). Agent Harkins approached the driver's side, and Agent Brady stood back by the right rear portion of the vehicle to provide protection for Harkins. (A. 7). After Agent Harkins approached the driver, Agent Brady on the righthand side of the car identified himself as an immigration officer and asked the occupants in English their citizenship. Apparently they did not understand. (A. 9). Brady then spoke to the two occupants in Spanish, questioned them as to their citizenship, and asked for but did not receive "papers." (A. 7). Thereafter the respondent standing at the rear of the vehicle with Agent Harkins was given his *Miranda* rights and taken into formal custody along with the passengers. (A. 8).

Trial in the District Court

In the Southern District of California in a two-count indictment, the respondent was charged with the unlawful transportation of two illegal aliens, Elsa Marina Hernandez-Serabia (Count One) and Jose Nunez-Ayala (Count Two) in violation of 8 U.S.C. 1324(a)(2). (R. 1-2). During the jury trial Jose Nunez-Ayala and Elsa Marina Hernandez-Serabia were called as Government witnesses and testified that they were born in Mexico and Guatemala, respectively, and had entered the United States illegally on 11 March 1973 (Tr. 24-27, 57, 63-65). Both gave testimony used by the Government in addition to other statements

attributed to respondent that when the vehicle that respondent was driving was just about to be stopped he said, "Well, they busted us." (Tr. 33-34) or "Here comes the immigration." (Tr. 70, 107). On cross-examination the respondent denied that he made such statements to the aliens. (Tr. 91). Both aliens gave testimony relating to the apparently false immigration papers used to gain entry into the United States. (Tr. 25-26, 64-65). The prosecutor cross-examined the respondent as to the Mexican and American money on his person at the time he was arrested, and the next question of the prosecutor challenged the respondent's statement that he had not been in Mexico since 1970. (Tr. 90). The jury returned a verdict of guilty as to both counts, and the district court sentenced the respondent to a period of four years confinement followed by five years probation. (A. 11-12). The motion to suppress the aliens found in the stop of the respondent's car was heard at the time of trial and denied. (A. 10).

Court of Appeals

On 22 May 1973 an appeal was taken to the United States Court of Appeals for the Ninth Circuit. On 23 October 1973 this case with several other cases relating to *Almeida-Sanchez v. United States*, 213 U.S. 266 (1973), was scheduled for an *en banc* consideration by the thirteen active circuit judges. On 14 June 1974 based upon the decision of this Court in *Almeida-Sanchez* and other well-established precedent, the Court of Appeals, well attuned to the problems of law enforcement in the handling of aliens, *unanimously* reversed the conviction because to justify

a stop there must be at least "founded suspicion." *United States v. Brignoni-Ponce*, 499 F.2d 1109 (9th Cir. 1974). Other *en banc* decisions of that Court relating to stop and searches of vehicles for aliens were *United States v. Bowen*, 500 F.2d 960 (9th Cir. 1974) (checkpoint search); *United States v. Peltier*, 500 F.2d 985 (9th Cir. 1974); (*Almeida-Sanchez:* new rule or old rule), and *United States v. Morgan*, 501 F.2d 1351 (9th Cir. 1974) (search at San Clemente checkpoint not functional equivalent of border). This Court granted certiorari in *Bowen* (No. 73-6848), *Peltier*, (No. 73-2000), and *United States v. Ortiz*, (9th Cir. unpublished memorandum) (checkpoint search) (No. 73-2050). These other opinions were the subjects of substantial divergence of opinion of the circuit judges of the Ninth Circuit, but the stop and interrogation of the respondent without probable cause, founded suspicion, or a warrant of any type was condemned by *all* active circuit judges. The Court of Appeals rejected the Government's overly broad authority of 8 U.S.C. 1357(a)(1) as inconsistent with the well-established demands of the Fourth Amendment's protection of privacy. Although the Ninth Circuit disagreed with the Tenth, *United States v. Bowman*, 487 F.2d 1229 (10th Cir. 1973), it concurred with the District of Columbia Circuit, *Au Yi Lau v. U.S. Immigration and Naturalization Service*, 445 F.2d 217, 223 (D.C.Cir. 1971), *cert. denied* 404 U.S. 864 (1971), which had relied upon the principles of this Court announced in *Terry v. Ohio*, 392 U.S. 1 (1968).

SUMMARY OF ARGUMENT

I.

Border Patrol officers operating a roving patrol 60 miles north of the Mexican-American border absent probable cause to believe a vehicle contains illegal aliens lack authority to forcibly stop a moving vehicle travelling on an interstate highway and to interrogate the occupants.

A. Since 1862 federal legislation regulating the entry of aliens has always manifested a Congressional concern to insure those enforcing immigration laws adhered to the principles of the Fourth Amendment. The "Coolie Trade Act" of 1862 empowered federal officers to "examine" American ships anywhere if they had "reasonable cause" to believe "coolies" were on board. In 1875 the first laws restricting the entry of aliens limited inspection of vessels arriving at the port, if the collector of the port "shall have reason to believe that any such obnoxious persons [prostitutes or convicts] are on board." The Chinese Exclusion Acts not only required a warrant to arrest a person believed to be an illegal Chinese person (Act of 13 Sept. 1888, ch. 1015, sec. 13, 25 Stat. 479) but later required that the arrest warrant have the written approval of the U.S. District Attorney (Act of 3 Mar. 1901, ch. 845, sec. 3, 31 Stat. 1093). In 1891 Congress empowered immigration officers to take testimony from aliens, and in 1917 this authority was expanded to permit immigrant inspectors "to board and search for aliens any. . . vehicle in which they believe aliens are being brought into the United States." Today this language is retained in 8 U.S.C.

1225(a), but in 1925 Congress granted an exemption from a warrant for this power to board and search vehicles. This power to search in context with other warrant exemptions and its own wording is circumscribed and consistent with a requirement of probable cause. In 1946 Congressional amendment to the 1925 warrant exemption for the search of a vehicle added the "reasonable distance" in lieu of the belief that aliens were being brought into the United States. The 1946 amendment must also be construed consistent with the Fourth Amendment, especially since the basic inspection authority (8 U.S.C. 1225(a)) still limits the search to particular vehicles. Although the Attorney General asked for authority to "stop and search" vehicles, Congress adhered to its original language, "board and search." The term "board" does not imply the authority to "stop," and there is no express Congressional grant of authority to immigration officers to interdict highway traffic. The legislative history of the section 235(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1225(a), manifests a Congressional concern to limit at the port of entry indiscriminate questioning of citizens, which would be much less warranted on an interior interstate highway. Where the agents thought the occupants to be of Mexican descent, there was not even minimal compliance with the statute that the person to be interrogated be a "person believed to be an alien," because there are too many American citizens of apparent Mexican descent in Southern California to create a justifiable nexus to alienage.

B. Although the stop of respondent's vehicle was a "seizure" under *Terry v. Ohio*, 392 U.S. 1 (1968), the

border patrol officers had no objective articulable facts to justify this forcible intrusion. Hunches of officers, especially on racial or ethnic lines, are insufficient. Although a stop of a person on a street based on a reasonable belief that criminal activity is underfoot (founded suspicion) may be justified, a stop of a moving vehicle on a highway requires probable cause.

C. The concept of area-wide probable cause, especially without a warrant, is inapplicable.

1. The "area-wide equivalent of probable cause" does not, without more, automatically arise in an amorphous zone known as "the area of the Mexican border." *Camara v. Municipal Court*, 387 U.S. 523 (1967), is not comparable, and even assuming that some form of area-wide probable cause might be found, that requirement would need much greater specificity than "the area of the Mexican border."

2. *Camara* requires that where closely regulated area-wide probable cause is applicable, a warrant must be obtained in advance of the intrusion or inspection. The intervention of a neutral judicial officer is necessarily consistent with the Fourth Amendment. The rare situations where neither probable cause nor a warrant are necessary are strictly limited to emergency situations. If a warrant is a prerequisite for health or fire inspection of buildings, then it would be necessary for forcible stops of the travelling public on the highway for interrogation.

D. The alien witnesses, themselves, and their testimony were used against the respondent. The Fourth Amendment excludes verbal evidence as well as physical evidence. Since the respondent's vehicle was stopped, he had standing to object to the result of the unlawful intrusion.

E. *Carroll v. United States*, 267 U.S. 132 (1925), has been consistently followed by this Court so that the result here is not a "new rule." This case involving the application of 8 U.S.C. 1357(a)(1) was one of first impression for the Ninth Circuit which adhered to its earlier precedents requiring at least "founded suspicion" for such a stop.

II.

The only articulated basis for this vehicle stop was that the occupants appeared to be of Mexican descent. The right to travel on the highways without interference from federal officers is a fundamental right of constitutional proportions. Persons of Mexican descent constitute an identifiable group who when subject to invidious discrimination are entitled to equal protection of the laws.

Discrimination on a racial or national basis is prohibited by the Fifth Amendment. Even though the power may be proper on its face, its application against a certain group may be unconstitutional. Distinctions based on "ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." Invidious discrimination by

officers constitutes a defense to the criminal action, and the fruits of the improper stop must be suppressed.

ARGUMENT

I.

ABSENT A WARRANT BORDER PATROL OFFICERS MUST HAVE PROBABLE CAUSE TO FORCIBLY STOP A VEHICLE TRAVELLING ON AN INTERIOR HIGHWAY AND TO INTERROGATE THE OCCUPANTS OF THE VEHICLE.

A. The history of legislation regarding Immigration officer powers does not establish a Congressional abandonment of the requirement of probable cause to forcibly stop a vehicle on an inland highway to conduct an interrogation concerning alienage.

The first federal legislation regulating entry of aliens was the prohibition on the "Coolie Trade" by American citizens in American vessels. Act of 19 Feb. 1862, ch. 27, 12 Stat. 340.[3] These Congressional prohibitions were not so much directed against the Chinese "coolies" as against those who would transport in ships these oriental servants involuntarily held in service or labor. Under Section 6 of the Act of 19 Feb. 1862, ch.

[3] Although this legislation is of ancient origin, it was only recently repealed. Public Law 93-461; 88 Stat. 1387 (20 October 1974).

27, 12 Stat. 341, the President was authorized and empowered:

> "to direct and order the vessels of the United States, and the masters and commanders thereof, to *examine* all vessels navigated or owned in whole or in part by citizens of the United States, and registered, enrolled, or licensed under the laws of the United States, wherever they may be, whenever, in the judgment of such master or commanding officer thereof, *reasonable cause shall exist to believe that such vessel has on board, in violation of the provisions of this Act, any subjects of China known as 'coolies' for the purpose of transportation. . . .*" (Emphasis Added).

Although it might be contended that the power of the United States was sufficient at certain times and places (i.e. at the time of arrival at the port of entry) to examine all vessels, this Congressional authorization empowered federal officers to examine American ships at *any place* but such power was expressly limited to the requirement of reasonable or probable cause to believe that the "coolies" were on board the vessel. The same section appears as section 2163, *Revised Statutes of the United States* (1878 2d ed.) and directed that the examining officer have:

> *"reasonable cause . . . to believe that such vessel has on board any subjects of China, Japan or other oriental country, known as 'coolies'. . . ."* 18 Stat. 377. (Emphasis added).

This section constitutes one of the seven sections (sections 2158-2164) that serve as the first known compilation of the laws relating to Immigration, Title XXIX *Revised Statutes of the United States*, (1878 2d ed.).

The first federal laws restricting entry of the immigrants themselves were promulgated in 1875. Act of 3 Mar. 1875, ch. 141, 18 Stat. 477; see *Kleindienst v. Mandel*, 408 U.S. 753, 761 (1972). The 1875 law prohibited the entry of women for purposes of prostitution or persons convicted of felonious crimes other than political offenses. Again the power to search vessels was restricted:

> "Every vessel arriving in the United States may be inspected under the direction of the collector of the port at which it arrives, *if he shall have reason to believe that any such obnoxious persons [prostitutes or convicts] are on board. . . .*" Act of 3 Mar. 1875, ch. 141, sec. 5, 18 Stat. 477. (Emphasis Added).

The clear intent of the legislation was to empower officers at the port of entry to conduct limited searches for the purpose of excluding designated classes of aliens. By the Act of 3 Aug. 1882, ch. 376, sec. 2, 22 Stat. 214, authorization to board ships arriving at a port of entry was expanded as to the categories of persons to be excluded and granted the power of examination of those on ship. This law provided: "And if on such examination there shall be found among such passengers any convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge . . ., and such person shall not be permitted to land." 22 Stat. 214.

Although the Chinese Exclusion Acts initiated in 1882 were not a model of legislation for the "land of opportunity,"[4] these laws contained express statutory

[4] Repealed by Act of 17 Dec. 1943, c. 344, 57 Stat. 600. See also note 25, *infra*.

limitations on the apprehension of those who might be illegal Chinese. These laws set forth the tone of true Congressional concern for the rights of those who might be suspected of being illegal aliens. The procedure for an arrest of such person was spelled out with particularity:

> "That any Chinese person, or person of Chinese descent, found unlawfully in the United States, or its Territories, may be arrested upon a warrant issued upon a complaint, under oath, filed by any party on behalf of the United States, by any justice, judge, or commissioner of any United States court, returnable before any justice, judge, or commissioner of the United States court, or before any United States court, and when convicted, upon a hearing, and found and adjudged to be one not lawfully entitled to be or remain in the United States, such person shall be removed from the United States to the country whence he came." Act of 13 Sept. 1888, ch. 1015, sec. 13, 25 Stat. 479.

The arrest could be made only after proper issuance of a warrant. Congress later provided additional protection:

> "That no warrant of arrest for violations of Chinese-exclusion laws shall be issued by United States commissioners excepting upon the sworn complaint of a United States district attorney, assistant United States district attorney, collector, deputy collector, or inspector of customs, immigration inspector, United States marshal, or deputy United States marshal, or Chinese inspector, *unless the issuing of such warrant of arrest shall be first approved or requested in writing by the United States district attorney of the district in which*

issued." Act of 3 Mar. 1901, ch. 845, sec. 3, 31 Stat. 1093. (Emphasis added).

Even the formal requirement of a warrant for arrest was further restricted by the additional condition precedent of written approval of the chief federal prosecutor of the district.

In 1891 the first Congressional authorization was passed outlining the powers of immigration inspection officers to inspect alien immigrants at the time of their arrival. Act of 3 Mar. 1891, ch. 551, sec. 8, 26 Stat. 1085. Section 8 provided: "The inspection officers and their assistants shall have power to administer oaths, and to take and consider testimony touching the right of any such aliens to enter the United States, all of which shall be entered of record." 26 Stat. 1085. In 1903 the authority of these immigration officers was expanded:

> "Immigration officers shall have power to administer oaths and to take and consider testimony touching the right of any alien to enter the United States, and, where such action may be necessary, to make a written record of such testimony, and any person to whom such an oath has been administered under the provisions of this Act who shall knowingly or willfully give false testimony or swear to any false statement in any way affecting or in relation to the right of an alien to admission to the United States shall be deemed guilty of perjury and be punished as provided by section fifty-three hundred and ninety-two, United States Revised Statutes." Act of 3 Mar. 1903, ch. 1012, sec. 24, 32 Stat. 1219.

In 1907 this authority was included in a general revision of the immigration laws. Act of 20 Feb. 1907,

ch. 1134, sec. 24, 34 Stat. 906. The same statute even announced that the entry and inspection of aliens along the borders of Canada and Mexico were to be conducted "so as not to unnecessarily delay, impede, or annoy passengers in ordinary travel between the United States and said countries. . . ." Act of 20 Feb. 1907, ch. 1034, sec. 32, 34 Stat. 908. If Congress was then concerned about the fair and unobtrusive contacts of immigration officers at the border, *a fortiori* its concern would be greater for such forcible stops and interrogations over sixty miles from the border.

The general revision of immigration laws in 1917 announced for the first time the right of immigration officers to board and search vessels and vehicles:

> "Immigrant inspectors are hereby authorized and empowered to board and search for aliens any vessel, railway, car, or any other conveyance, or *vehicle in which they believe aliens are being brought into the United States.* Said inspector shall have power to administer oaths and to take and consider evidence touching the right of any alien to enter, re-enter, pass through, or reside in the United States. . . ." Act of 5 Feb. 1917, ch. 29, sec. 16, 39 Stat. 886.[5] (Emphasis added).

In 1925 Congress in an appropriation bill granted immigration officers the power to arrest and search without warrant. Act of 27 Feb. 1925, ch. 364, 43 Stat. 1049-1050. Although Congress excused the requirement of a warrant, the powers to arrest and search were carefully circumscribed:

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[5] As Justice White noted in his dissent in *Almeida-Sanchez*, 413 U.S. 266, 292, this Congressional authorization *and limitation* still exists today as 8 U.S.C. 1225(a). (Sec. 235(a) of the Immigration and Nationality Act of 1952).

"*Provided further*, That hereafter any employee of the Bureau of Immigration authorized so to do under regulations prescribed by the Commissioner General of Immigration with the approval of the Secretary of Labor, shall have power without warrant (1) to arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of law regulating the admission of aliens, and to take such alien immediately for examination before an immigrant inspector or other official having authority to examine aliens as to their right to admission to the United States, and (2) to board and search for aliens any vessel within the territorial waters of the United States, railway car, conveyance, or vehicle *in which he believes aliens are being brought in to the United States;* and such employee shall have power to execute any warrant or other process issued by any officer under any law regulating the admission, exclusion, or expulsion of aliens." 43 Stat. 1049-1050. (Emphasis added).

The power to arrest or take into custody aliens without warrant is limited to violations occurring in the immigration officer's presence or view. This is far more restrictive than the standard authority today granted to federal law enforcement officers to arrest persons for any federal offense committed in their presence or where reasonable cause exists to believe a person has committed a federal felony.[6] The essence of the right

[6]For example, FBI agents today have power to arrest for any federal offense committed in their presence or any federal felony if the agents "have reasonable grounds to believe that the person to be arrested has committed or is committing such felony." 18 U.S.C. 3052.

of immigration officers to forcibly stop vehicles arises out of subsection (2) which permits the boarding and searching for aliens of any vehicle "in which he believes aliens are being brought into the United States." The legislative language clearly suggests that the immigration officers must have a "belief" that aliens are being illegally introduced *into* the United States, which, of necessity, connotes activities at or in the immediate vicinity of an international border. Together subsections (1) and (2), the exceptions excusing a warrant having been so carefully constricted, emphasize the need for immigration officers to secure a warrant in all other circumstances. Again, Congress had anticipated this Court's emphasis on the need for a warrant. *Terry v. Ohio*, 392 U.S. 1, 20 (1968). This last provision of the above cited statute empowered immigration officers to execute "any warrant or other process" which would be necessary in the fair enforcement of the immigration laws. Congress had thus enacted legislation consistent with the Fourth Amendment and the decision of *Carroll v. United States*, 267 U.S. 132 (1925), decided in the same year.

The 1946 amendment, with a dearth of legislative history other than the apparently unopposed request of the Attorney General, modified and expanded the 1925 legislation:

> "Any employee of the Immigration and Naturalization Service authorized so to do under regulations prescribed by the Commissioner of Immigration and Naturalization with the approval of the Attorney General, shall have power without warrant (1) to arrest any alien who in his presence or view is entering or attempting to enter the

United States in violation of any law or regulation made in pursuance of law regulating the admission, exclusion, or expulsion of aliens, or any alien who is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest, but the person arrested shall be taken without unnecessary delay for examination before an officer of the Immigration and Naturalization Service having authority to examine aliens as to their right to enter or remain in the United States; (2) to board and search for aliens any vessel within the territorial waters of the United States, railway car, aircraft, conveyance, or vehicle, within a reasonable distance from any external boundary of the United States; and (3) to make arrests for felonies which have been committed and which are cognizable under any law of the United States regulating the admission, exclusion, or expulsion of aliens, if the person making the arrest has reason to believe that the person so arrested is guilty of such felony and if there is likelihood of the person escaping before a warrant can be obtained for his arrest, but the person arrested shall be taken without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States; and such employee shall have power to execute any warrant or other process issued by any officer under any law regulating the admission, exclusion, or expulsion of aliens."[7] Act of 7 Aug. 1946, ch. 768, 60 Stat. 865.

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[7]It is anomolous that the Executive (Commissioner and Attorney General) could adopt regulations excusing a warrant leading to a criminal prosecution, when he does not have power to such issue warrants. *Mancusi v. De Forte*, 392 U.S. 364, 371 (1968).

Subsection 1 concerning the power of arrest without a warrant is expanded to "any alien who is in the United States in violation of any such law or regulation." However, the power to arrest is limited to a situation where the alien is likely to escape before a warrant can be obtained for his arrest. Again the Congressional emphasis was placed on a warrant requirement even if an immigration officer had probable cause to believe that the alien was in violation of immigration laws. Subsection (2) is substantially altered. In 1925, the right to board and search the vehicle anywhere in the United States was limited to the vehicle "in which he [the immigration officer] believes aliens are being brought into the United States." The 1946 amendment deletes that requirement and substitutes "within a reasonable distance from any external boundaries of the United States." This legislative amendment can be construed consistent with the Fourth Amendment or taken as a blanket and unlimited authority of the Immigration and Naturalization Service to prescribe regulations that would make legal searches any place within the United States "within a reasonable distance from any external boundary of the United States." This statute has now been construed to be consistent with the Fourth Amendment in *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973).

Almeida-Sanchez was consistent with the previous Congressional legislation and its historical precedents. The 1925 restriction on the right to board and search vehicles in the United States by its express language established as condition precedent to such boarding and searching that there exist probable cause that aliens were being illegally introduced into this country. This

requirement would indicate that the knowledge could only be derived by immigration officers at or in the immediate vicinity of the border. The 1946 limitation attains harmony with the Fourth Amendment if Congress, in excusing the probable cause requirement, carefully limited such authority to areas so immediate to the boundary line that a connection may be shown with a border crossing. "Reasonable distance" can vary with any interpretation,[8] and this Court in *Almeida-Sanchez* furnished flexibility with the concept of "functional equivalents" of the border where probable cause was not necessary in an area near and connected with the border. 413 U.S. 266, 273.

Justice Powell in his concurring opinion discussed the possibility of a warrant based upon the functional equivalent of probable cause at areas near the border. 413 U.S. 266, 283-285. Such interpretations permit border searches at places within the interior without probable cause, and "reasonable distance" could then

[8]The implementing immigration regulation states that reasonable distance "means within one hundred air miles from the external boundary of the United States or any shorter distance" (8 C.F.R. 287.1(a)(2)). That same regulation also provides that the I.N.S. Commissioner may declare a distance in excess of one hundred miles to be reasonable (8 C.F.R. 287.1(b)). The creation of such an unrestrained authority is surely inconsistent with the general scheme of Congressional regulation which carefully circumscribed the power to arrest without warrant for violation of the immigration laws (subsection (1) and the power to arrest without warrant for felonies (subsection (3). Congress conditioned those powers upon the common law requirement of probable cause *and* the additional requirement that there be a "likelihood of the person escaping before a warrant can be obtained for his arrest."

be construed to co-extend with those situations. The Congressional language is given effect, and the Fourth Amendment is not violated.

The legislative history of the 1946 amendment concerning the broadening of the power of immigration officers to board and search vehicles is contained in one sentence of a letter of Attorney General Francis Biddle dated 10 February 1945 to the Chairman, Committee on Immigration and Naturalization which stated:

> "In the enforcement of the immigration laws it is at times desirable *to stop and search* vehicles within a reasonable distance from the boundaries of the United States *and the legal right to do so should be conferred by law.*" H.R.Rep. No. 186, 79th Cong., 1st Sess. 2 (1945).[9] (Emphasis added).

The statutory language continues the reference to "board and search," notwithstanding the Attorney General requested the power to "stop and search vehicles." The concept of boarding a vehicle inherently implies the absence of motion.[10] Where there exists an inconsistency between the desired intent of the Attorney General and the language used by Congress, the plain wording of Congress should control. Although a technical distinction can be made between "boarding" and "stopping," the most important consideration is that Congress did not confer upon Border Patrol agents

[9]1946 U.S. Code Cong. Service, 1414-1415.

[10]*Websters New World Dictionary of American Language* (2d College ed. 1972) defined the verb "board" "to get on (a train, bus, etc.)." The historical reference to coming along side a ship to board with a hostile purpose does not appear applicable to a vehicle.

the power to stop moving vehicles well within the United States.

This legislation again reveals the very limited context in which Congress permitted these carefully circumscribed invasions of privacy of an individual without a warrant. In light of the general scheme, it is difficult to argue for such open-ended powers now requested by the petitioner.

The Immigration and Nationality Act of 1952 (66 Stat. 163) was a comprehensive revision of the Immigration, Naturalization, and Nationality Codes. Although the petitioner places the emphasis of immigration officers' right to stop and interrogate under section 287(a) (8 U.S.C. 1357(a)), the basic authorization for inspection by immigration officers is in section 235(a) (8 U.S.C. 1225(a)).[11] This now controlling statute, section 235(a), also empowers immigration officers to board and search vehicles, but it is restricted

[11]Section 235(a) provides in part: "Immigration officers are hereby authorized and empowered to board and search any vessel, aircraft, railway car, or other conveyance, or vehicle in which they believe aliens are being brought into the United States. The Attorney General and any immigration officer, including special inquiry officers, shall have the power to administer oaths and to take and consider evidence of or from any person touching the privilege of any alien or person he believes or suspects to be an alien to enter, reenter, pass through, or reside in the United States or concerning any matter which is material and relevant to the enforcement of this Act and administration of the Service, and, where such action may be necessary, to make a written record of such evidence." 66 Stat. 198-199. This section continues to today the inspection authority Congress granted in 1891 *supra*. Cf. *Almeida-Sanchez*, dissenting opinion of Justice White, 413 U.S. 266, 292.

by the requirement that these officers possess the personal belief that aliens are being brought into the United States. The statutory language requires direct or indirect personal knowledge of immigration officers that aliens are in the process of being brought into the United States. The phrase "being brought into the United States" requires proximity to the border or a functional equivalent and a basis of belief by immigration officers as to particular vehicles. The legislative history, H.R.Rep. 1365, 14 Feb. 1952, in the analysis of the 1952 legislation consolidates section 235 (Chapter 4) and section 287. Concerning the authority to question under section 235, the House Report states:

> "Any person coming to the United States may be required to state under oath the purpose or purposes for which he comes, the length of time he intends to remain, whether or not he intends to remain permanently, whether, if an alien, he intends to become a citizen, and such other information as will aid the immigration officers in determining whether the person is a national of the United States or an alien, and, if the latter, whether he is subject to exclusion under any of the provisions of the bill. *It is not intended by this provision to sanction the indiscriminate questioning or harrassment of citizens returning to the United States, but it is to be used by the immigration officers whenever there is reason to believe that the citizen is violating or about to violate the law and is about to become expatriated.*[12] (Emphasis added).

[12]H.R. Rep. 1365, 82d Cong. 2d Sess. 54-55 (1952); 1952 U.S. Cong. and Adm. News, 1709-1710. The earlier Senate Report on the same provision declared: "In conjunction with their inspection of aliens, the bill authorizes the immigration

If the right to question at the border was intended to be so narrowly circumscribed to a situation where immigration officers were to have probable cause to believe that the person was violating or about to violate the law, with how much greater force does such a requirement exist at a substantial distance from the border on a heavily travelled highway?[13]

When section 287(a) and section 235(a) are compared, there is some overlap. Section 235(a) provides the general authorization which is the principal power allotted to immigration officers to inspect persons who might be aliens and is the basic citation of authority. Although the section 287(a) exceptions to the requirement for a warrant are enumerated, they cannot be logically construed to be the basis of an unlimited power to interrogate any person anywhere in the United States.

Section 287(a)(1), 8 U.S.C. 1357(a)(1), provides:

officers to board and search vessels, aircraft, railway cars or any other conveyance or vehicle in which they believe aliens are being brought into the United States. Under similar language in S. 716, immigration officers would be empowered to search such conveyances in which they believe or suspect aliens are being brought into the United States, but since some question was raised as to the effect of the word "suspect," it has been eliminated in the bill. *However, the change is not intended to restrict or limit in any way the existing authority of appropriate immigration officers to conduct such searches upon the basis of probable cause.*" S. Rep. 1137, 82d Cong. 2d Sess. 27 (1952). (Emphasis added).

[13]In the same analysis there is only a brief general reference to section 287. H.R.Rep. 1365, 82d Cong. 2d Sess. 55 (1952); 1952 U.S. Cong. and Adm. News, 1710.

> "To interrogate any alien or person believed to be an alien as to his right to be or remain in the United States."

The statute excuses the requirement of a warrant for such interrogation if there exists a justifiable basis for interrogation. The petitioner contends that this statute permits questioning of any person *any place* and further that it permits the interdiction of traffic to accomplish this result despite the statute's lack of reference to the authority of immigration officers "to forcibly stop traffic" so as to interrogate occupants of vehicles travelling within the interior of the United States. This statutory authorization is further restricted to questioning of "aliens" (implying actual knowledge) or "person believed to be an alien" (Implying probable cause). Respondent submits that this statute when read in conjunction with *Carroll and Almeida-Sanchez*, absent a warrant, requires that the immigration officer have probable cause to believe that an occupant of a vehicle is an illegal alien before he has the authority to stop it and question the occupant. In this case, the immigration officer, believing the occupants appeared to be of Mexican descent, did not have probable cause or founded suspicion to believe that these persons were aliens. There are too many American citizens of Mexican descent in Southern California to give any credence to such claim. *United States v. Mallides*, 473 F.2d 859, 860 (9th Cir. 1973).

B. Terry v. Ohio, 392 U.S. 1 (1968), does not authorize, in the absence of probable cause, a warrantless forcible stop of an automobile travelling on a highway a substantial distance from the border.

The vehicle of the respondent was forcibly stopped on an interstate highway over 60 miles from the Mexican border and the occupants interrogated by armed Border Patrol agents because they believed these people appeared of Mexican descent. The regularly established checkpoint was closed, and the Border Patrol officers pursued and stopped the vehicle of respondent during the hours of darkness. When the stop was made, one officer took a position to provide protection to the other. (A. 7).

This stop on the highway was a "seizure" of the vehicle and the occupants therein within the meaning of the Fourth Amendment.[14] *Henry v. United States*, 361 U.S. 98, 103 (1959) (a car travelling on a street in Chicago); *Terry v. Ohio*, 392 U.S. 1, 9 (1968) (a person walking down the street in Cleveland). This Court in *Terry, supra*, held: "It must be recognized that whenever a police officer accosts an individual and

[14]The reference to a so-called "automobile exception" has been in terms of excusing the *warrant* requirement, cf. *Cardwell v. Lewis*, 417 U.S. 583, 589-590, 597 (1974), but this Court has held that nothing less than probable cause is necessary to stop a vehicle. *Carroll v. United States*, 267 U.S. 132, 153-154 (1925); *Henry v. United States*, 361 U.S. 98, 104 (1959); *Almeida-Sanchez v. United States* 413 U.S. 266, 272, 274-275. Justice Powell's concurring opinion in which he joined the majority did suggest the possibility of something less than probable cause but then only pursuant to a warrant. 413 U.S. 266, 277-285.

restrains his freedom to walk away, he has 'seized' that person." 392 U.S. 1, 16; and further stated: "We therefore reject the notions that the Fourth Amendment does not come into play at all as a limitation upon police conduct if the officers stop short of something called a 'technical arrest' or a 'full-blown search.'" 392 U.S. 1, 19. The person driving an automobile on an interstate highway has an expected right of uninterrupted freedom of movement and the right to be let alone.

Both fundamental rights are protected by the Fourth Amendment. The Government must justify its interference. It did not do so. Although this Court in *Terry, supra*, permitted the intrusion to stop an individual on the street upon something less than probable cause, the Court required an *objective* standard based upon articulable facts that could be later presented to a neutral judge to assure that the intrusion was reasonable under its peculiar circumstances. Chief Justice Warren speaking for the Court in *Terry* stated:

> "And in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. The scheme of the Fourth Amendment becomes meaningful only when it is assured at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances. And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts

available to the officer at the moment of seizure or the search 'warrant a man of reasonable caution in the belief' that the action was appropriate?"[15] 392 U.S. 1, 21-22.

Although less than probable cause might be enough in some circumstances, the particular intrusion must be justified by specific factual circumstances. The Court especially eschewed stops based upon hunches or unfair generalizations:

"Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more than inarticulate hunches, a result this Court has consistently refused to sanction."[16] 392 U.S. 1, 22.

The experienced police officer's studied observations of three men believed to be "casing" a downtown store for an armed robbery justified the stop for further inquiry in *Terry*.[17] The Border Patrol officers had less

[15]The Court also described the basis for the stop as "where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot." 392 U.S. 1, 30. (Emphasis added).

[16]*See also* 392 U.S. 1, 27.

[17]The facts in *Terry* did not formally resolve the issue of the officer's right to interrogate the suspect, even though Justice White in his concurring opinion states that questioning would be appropriate but the suspect need not answer or be commpelled to answer. 392 U.S. 1, 33-34. If the Border Patrol officer can compel the stop, then some admonition by the officer is necessary to apprise the occupants that he could not compel them to talk. Advice of rights should not be limited to a formal arrest, cf. 8 C.F.R. 287.3, but given where there is deprivation of a freedom of action in a significant way. *Miranda v. Arizona*, 384 U.S. 436, 477 (1966).

than a hunch, a racial or ethnic bias, to support their stop of respondent's vehicle. The Court of Appeals consistent with its own precedent[18] adhered to the teachings of *Terry* and required that the Border Patrol agents who before they stop a vehicle must "possess facts" which constituted a founded suspicion that he or his passengers were illegal aliens. 499 F.2d 1109, 1112.[19] The holding and reasoning of *Terry*,[20] which was interruption of the movement of a person on a street, supports the conclusion of the Court of Appeals; however, the respondent submits that when federal officers seek to stop a moving vehicle on the highway, especially by a roving patrol, probable cause is required

[18]*Wilson v. Porter*, 361 F.2d 412 (9th Cir. 1966).

[19]The respondent contends that under *Carroll* and its progeny through *Almeida-Sanchez*, a stop must be based upon not less than probable cause, especially in light of the legislative history designed to prevent harrassment by immigration officers. See 1952 *Cong. & Adm. News* 1709-1710, n. 12 *supra* pp. 23-24). To sustain the position of the Court of Appeals, that issue need not be reached.

[20]*Adams v. Williams*, 407 U.S. 143 (1972), is consistent with the founded suspicion rationale and held: "A brief stop of a *suspicious* individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the *facts* known to the officer at the time." 407 U.S. 143, 146. It should be noted that in *Adams* it was a parked car which did not require the interruption of moving motor vehicle traffic. Also in *Terry* the intrusion of an on-the-street encounter in public is less burdensome than the stopping and pulling of a vehicle off the highway.

for such stop. The Court of Appeals unanimously held that a lesser standard of "founded suspicion" was necessary but lacking. Although probable cause is and should be the standard for such a stop, the failure of the Government to satisfy even the lesser standard serves to sustain the action of the Court of Appeals.

C. The roving Border Patrol stop of vehicle on a major highway over sixty miles from the Mexican border cannot be justified under the concept of "area-wide equivalent of probable cause," especially in the absence of a warrant.

1. The area-wide equivalent of probable cause does not justify stops in the area of the Mexican border.

The petitioner questions but does not dispute the stop as a roving patrol stop (Brief for Pet. 8, n.3), as found by the decision of a *unanimous en banc* Court of Appeals. 499 F.2d 1109, 1110. This Court always gives great weight to the factual determinations of a Court of Appeals familiar with the problem peculiar to its jurisdiction. *Cf. Hamling v. United States*, 418 U.S. 87 (1974). Since the checkpoint was not operational, these Border Patrol officers reverted to the type of patrol expressly condemned in *Almeida-Sanchez*.

There was neither probable cause for the stop,[21] nor a warrant to authorize the roving patrol. Faced with

[21] Also, the Government does not contend there was "founded suspicion" or "reasonable factual circumstances" for the stop.

these facts, the petitioner is forced, of necessity, to propose an innovational exception to the well-established requirements of the Fourth Amendment regulating the activities of law enforcement officers in the seizure of persons and automobiles.

The "area-wide equivalent of probable cause" proposed by the Government is not defined, but referred to generically as "in the area of the Mexican border." (Brief for Pet. 9, 13, 21). The ambiguity of the term implies an unrestrained, and in this case undefinable, power in the hands of federal officers that the Fourth Amendment was adopted to eliminate.[22]

The Government's reliance on *Camara v. Municipal Court*, 387 U.S. 523 (1967), is misplaced.[23] In evaluating the application of *Camara* to this case, the following factors should be considered: (1) the purpose of the intrusion, (2) the nature of the intrusion, (3) the area covered, (4) the number of persons affected, (5) the legislative or administrative safeguards, (6) the history of the practice, (7) other alternatives, and (8)

[22] Speaking to the authority to search a commercial warehouse, this Court in a similar vein stated, "But the decision to enter and inspect will not be the product of the unreviewed discretion of the enforcement officer in the field." *See v. City of Seattle*, 387 U.S. 541, 545 (1967).

[23] The respondent recognizes that five members of this Court rejected in *Almeida-Sanchez* a similar Government-suggested non-warrant application of *Camara* (413 U.S. 266, 270, 277-285) as well as the Government's reliance on the detailed statutory regulation of business cases, *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970), and *United States v. Biswell*, 406 U.S. 311 (1972) (413 U.S. 266, 270-271, 280-281), but presents additional reasons why the Government's reliance on *Camara* is inappropriate.

the procedure as criminal or administrative. Most of these points are treated or referred to in *Camara* or its companion case of *See v. City of Seattle*, 387 U.S. 541 (1967).

(1) The purpose of the ordinance in *Camara* was to enforce health regulations and in *See* to enforce fire inspection regulations. The purpose of the immigration roving patrol stops and inspections is to arrest and prosecute those transporting illegal aliens into the United States. *Camara* and *See* belong in a category of the first order of society's fundamental right of self-preservation,[24] whereas the influx of people from foreign countries, not regulated prior to 1862, is not inherently hazardous to a community or state.[25] For example, certain illegal aliens with familial ties in the United States have a defense to deportation. Cf. 8 U.S.C. 1251(f). (2) The nature of the intrusion is significant where the officers at their whim may curb a moving vehicle or demand the occupants account for

[24]See dissenting opinion of Justice Clark to *Camara* and *See*, 387 U.S. 541, 546-555.

[25]The Statue of Liberty dedicated in 1886 contained an invitation to exiles from other lands:

> "Give me your tired, your poor,
> Your huddled masses, yearning to breathe free,
> The wretched refuse of your teeming shore.
> Send these, the homeless, tempest-tost to me,
> I lift my lamp beside the Golden Door!"
> (Emma Lazarus, "The New Colossus.")

Efforts of society against sickness and poverty should not be limited to aliens. Any threat to the employment opportunities of citizens is best answered by laws proscribing employment of illegal aliens. See *United States v. Ortiz*, No. 73-2050, Brief for Resp. 34-35.

their right to be in the United States.[26] Authority to inspect buildings is of a much lower order. (3) *Camara* and *See* involved periodic inspections within a city, but here the Government seeks justification for its practice "in the area of the Mexican border." In *Camara* and *See*, the Court had also spoke in terms of more limited areas as the subject matter of search warrant. (4) Property owners within a designated city, much like the business proprietors in *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970), and *United States v. Biswell*, 406 U.S. 311 (1972), are a limited group fixed in location, but in the instant case, the Government seeks authority to regulate all highway traffic in the area of the Mexican border.[27] (5) *Camara* referred to "reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling," 387 U.S. 523, 538, but no such specific limitations have been announced for immigration officers. Congress has passed no legislation to stop traffic. The power to interrogate aliens is

[26]The American born, Spanish speaking, citizen might find it difficult to prove his citizenship. The INS estimate of a stop for questioning at a checkpoint at "no more than about 5 seconds per occupant" (Brief for Pet. 25) is inconsistent with senior Border Patrol Agents in the field who state that the average car is detained for questioning "approximately three to five minutes." *United States v. Ortiz*, No. 73-2050, Brief for Resp. Appendix p. 5a. The duration is solely within the power of the officer.

[27]Near where respondent was stopped, it has been estimated that 10,000,000 vehicles (and certainly more than that number of people) pass the checkpoint annually. See *United States v. Ortiz*, No. 73-2050, Brief for Resp. 13, n. 4.

recognized, but it cannot be argued that Congress left totally unfettered the right of the immigration officer to interrogate a person he subjectively believes to be an alien. 8 U.S.C. 1357(a)(1). The Congressional requirement for a belief that the person is an alien is more properly consistent with the requirement of probable cause. Such interrogations must be supported by objective articulable facts that would lead a prudent immigration officer to believe that the person was an alien and violating the law.[28] (6) Although the right of cities to protect their health and safety has been recognized since time immemorial, the questionable immigration practice of stopping vehicles was initiated in 1927 but operated without statutory or court approval. In 1946 the Attorney General requested the power "to stop," but the Congress adhered to its previous standard limited "to board." This practice received no public acceptance and was contrary to the legal principle announced in *Carroll.* (7) It is practically impossible to check for fire or health hazards without an inspection of buildings, but alienage can be determined at any point the alleged alien has regular contacts with business or governmental activities involving registration, i.e. driving, owning a vehicle, attending school, voting, receiving welfare or unemployment benefits, marrying, and working in the government employ.[29] (8) A key aspect of *Camara* in

[28]This suggestion is similar to the one set out in the legislative history for interrogations *at the border*. 1952 U.S. Cong. and Adm. News 1710; H.R.Rep. 1365, 82d Cong. 2d Sess. 55 (1952).

[29]See *United States v. Ortiz*, No. 73-2050, Brief for Resp. 31-35 for additional alternatives and suggestions for detection and proper disposition of illegal aliens.

permitting something less than traditional notions of probable cause to justify the intrusion was the fact that these officers were not searching for evidence of criminal action, 387 U.S. 523, 530. This is precisely the object of immigration officers' searches–illegal entrant aliens punishable under 8 U.S.C. 1325[30] or persons unlawfully transporting them subject to a penalty of five years confinement or $2,000 fine, or both, for each alien. 8 U.S.C. 1324.[31] The characterization by Justice Powell (413 U.S. 266, 278, 279) that both *Camara* and alien invasions of privacy produce "evidence of crime" should permit the distinction that *Camara*-type penalties were minor, i.e. petty offenses. The Government's self-serving claim that only 3% of the illegal aliens apprehended are prosecuted is no effective answer, because the Government would then exclusively control the ability to determine whether their conduct is criminal or administrative. The best answer is that Border Patrol officers are armed; health and fire inspectors are not.[32]

[30]A second offender for the simple act of illegal entry is subject to a felony penalty: two years imprisonment or $1,000 fine, or both. 8 U.S.C. 1325.

[31]Although the INS is justifiably proud of its work in stemming the flow of drugs, see *United States v. Ortiz*, No. 73-2050, Brief for Resp. 29-30, like the customs officers within the interior of the United States they should possess facts amounting to probable cause to justify the stop of a vehicle moving on the highway. The restriction of the customs officers may create a potential for abuse by immigration officers.

[32]Another factual distinction is that there appeared to be "reasonable factual circumstances" or "founded suspicion" for the actions taken in *Camara* (improper residential use of ground floor, 387 U.S. 523, 527) and in *See* (living quarters in a locked warehouse, 387 U.S. 541, 549).

The transparency of the Government's argument regarding area-wide equivalent of probable cause is discernible through its clearly arbitrary application. It is supposed to be applicable "in the area of the Mexican border" but might not be applicable in New York City (Pet. Brief 16 n. 7, 20-21). The statute says "reasonable distance," 18 U.S.C. 1357(a)(3), and the regulation defines this term as "100 air miles," 8 C.F.R. 287.1(a)(2), with a provision that the INS Commissioner may exceed the 100-mile limit.[33] Although this language is overly broad, it may be strictly construed so as not to transgress the prohibitions of the Fourth Amendment. The application of such a novel concept of the Executive defining an area as the functional equivalent of probable cause poses a serious threat to the principle of equal protection of the law. Persons living in San Diego and Tucson are entitled to no less invasion of their rights than the people of New York and Boston.[34]

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[33]Although the petitioner has not limited "the area of the Mexican border," it is implied that the 100-mile limitation would be applicable.

[34]The Fourth Amendment was a response to the infamous writ of assistance. *Boyd v. United States*, 116 U.S. 616, 624-627 (1886). Ironically, the British writ requesting the authority to search for imported contraband limited its authority to the port of Boston. Gray, *Writs of Assistance*, appendix I, Quincy's Massachusetts Reports, pp. 404-405. Even today New York City is subject to INS "sweeps," which are stops for interrogation of persons concerning their right to be in the United States without warrant or probable cause. An INS memo on New York "sweeps" suggests that agents stop people if they have certain speech patterns, wear serapes, carry brown lunch bags, or other characteristics intuitively created by the agents. *Hearings Before the Subcommittee on Immigration, Citizenship, and International Law of the Committee of the Judiciary*, H.R. 93d Cong. 1st Sess., 32-35 (26 July 1973).

2. Without probable cause a warrant cannot be excused.

The thrust of *Camara*, even permitting "something less than probable cause" for an area inspection, subjugated such invasion of privacy to the requirement of a warrant. The suggestion by the Government that the area-wide equivalent of probable cause is sufficient absent advance judicial approval through the warrant procedure unduly stretches the dual requirement of both probable cause and a search warrant.

Assuming arguendo that the Government has established the area-wide probable cause for stops and interrogations, the Government, in the face of *Almeida-Sanchez*,[35] but with some support of the dissenting opinion[36] and the concurring opinion of Justice Powell,[37] again contends that neither a warrant nor probable cause are required. The elimination of either of these requirements should be exceptional, otherwise the exceptions swallow the rule.

The language giving rise to this contention arose in *Camara*, where the Court stated: "Since our holding emphasizes the controlling standard of reasonableness, nothing we say today is intended to foreclose prompt inspections, even without the warrant, that the law has

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[35]It appears at least a majority of the Court would permit the use of area search warrants, 413 U.S. 266, 270, 277-285, 288, but in the absence of a warrant probable cause is required. 413 U.S. 266, 274-275, 281.

[36]Neither warrant nor probable cause are necessary for stop and search of the automobile in Imperial County (rural county) 25 miles from border. 413 U.S. 266, 285-299. (Dissent)

[37]In certain limited circumstances, neither probable cause nor a warrant is required. 413 U.S. 266, 277.

traditionally upheld *in emergency situations.*" 387 U.S. 523, 539. The alien problem cannot fairly be treated as an emergency as compared to the seizure or destruction of unwholesome food, compulsory vaccinations, or health quarantines. It would follow that if warrants are required for general community health (*Camara*) and fire protection (*See*) inspections, they would certainly be necessary in determining the Government's ephemeral concept of area-wide equivalent of probable cause that is operable in only certain parts of the United States.[38]

The roving patrol, the subject matter in *Almeida-Sanchez*, could be reasonably regulated through a warrant, which for not longer than the specified 10-day period[39] could permit a designated patrol of certain routes in an appropriate area in the immediate or proximate vicinity of the border. The warrant would specifically detail the procedure for a stop and the questions to be asked. The specific time of day such patrol could be operated could also be limited. Such warrants are not beyond comprehension.[40] In the

[38]Although the concept of the functional equivalent of probable cause is unstructured, Justice Powell gave, in comparison to the Government's concept, substantial specificity in a four-point standard (413 U.S. 266, 283-284) neither referred to nor apparently relied upon by the Government. The respondent would contend that an answer to these four-points are constitutionally necessary before a court may even consider "area-wide equivalent of probable cause."

[39]Rule 41(c), Federal Rules of Criminal Procedure.

[40]See *United States v. Ortiz*, No. 73-2050, Brief for Resp. Appendix A. Although such warrants are conceptually feasible, they are not now authorized by statute or rule (*Cf.* Rule 41, Federal Rules of Criminal Procedure).

request for such warrants, the Border Patrol could support their showing of need by reference to the complementary and interrelated efforts of other patrols or checkpoints, which would also be the subject of warrant applications.

Reference to *United States v. United States District Court*, 407 U.S. 297 (1972), supports the respondent's position for the necessity of a warrant. If the listening by federal officers to a conversation–an invasion of privacy that may cause no physical intrusion (i.e. *Katz v. United States*, 389 U.S. 347, 354-359 (1967)) demands a warrant, then all the more reason exists to require a warrant to permit officers to forcibly stop a travelling vehicle and actively interrogate the persons as to their citizenship.

The reference to license checks of drivers of motor vehicles is not comparable to an alien check, for as the Court of Appeals *en banc* properly noted "there was no way for a police officer to determine that a driver had a valid driver's license permitting him to operate a motor vehicle other than by stopping him and asking him to produce his license." *United States v. Bowen*, 500 F.2d 960, 964 (9th Cir. 1974).[41] A highway user

[41]This is substantially quoted from one of the leading cases authorizing a traffic stop. *Lipton v. United States*, 348 F.2d 591, 593 (9th Cir. 1965). In *United States v. Croft*, 429 F.2d 884, 886 (10th Cir. 1970), the defendant had not been singled out for a check by the roadblock. In *Myricks v. United States*, 370 F.2d 901 (5th Cir. 1967), the court held the power limited to traffic checks. *See United States v. Ortiz*, No. 73-2050, Brief for Resp. 46-47, 54-56. *Cf. Commonwealth v. Swanger*, 453 Pa. 107, 307 A.2d 875 (1973), where founded suspicion was held necessary for a license check stop.

may reasonably foresee a minor intrusion to see the permit for driving a car. The failure to possess such license, a minor offense, is greatly outweighed by the compelling state interest to insure that only competent drivers use the highway. The random patrol stop is more arbitrary than the roadblock technique, but the nature of intrusions cannot be compared with alien traffic checks purposely designed to ferret out serious criminal wrongdoing. However, such intervention might more effectively be conducted at or in the immediate vicinity of the border.[42]

Both *Camara* and the concurring opinion of Justice Powell in *Almeida-Sanchez* establish the requirement for a search warrant to justify the forcible stop of a moving vehicle proposed by the Government. The distance from the border, sixty miles, of this patrol stop further exemplifies the need for the intervention of neutral judicial scrutiny.

D. Under the announced rules of this Court since *Weeks v. United States* testimonial evidence obtained in violation of the Fourth Amendment must be suppressed.

Although not discussed by petitioner, the respondent submits that the Fourth Amendment would require the suppression of the testimony of the occupants of respondent's vehicle produced by the unlawful stop of the vehicle and interrogation of the occupants. The

[42]A stop might be permissible at a functional equivalent such as an established checkpoint *near the border* at a confluence of two or more roads extending from the border. *Almeida-Sanchez v. United States*, 413 U.S. 266, 272-273 (1973).

Court of Appeals made reference to the case of *United States v. Guana-Sanchez*, 484 F.2d 590 (7th Cir. 1973), for the suppression of this testimony, and this Court has granted certiorari in that case, No. 73-820.[43] 417 U.S. 967 (1974). The respondent contends that notwithstanding the disposition in *Guana-Sanchez*, the testimonial evidence of the alien witnesses, as well as the cross-examination of the respondent as to items taken at the time of his arrest, must be suppressed.

In *Guana-Sanchez*, the Government argues that the questioning of the passengers in the light of that case (i.e. police assistance to lost persons) was proper, and "[t]he alleged 'search' of the car is no part of the case as it reaches this Court."[44] Guana-Sanchez made no incriminating statements, and his arrest yielded no information pointing to a commission of an offense.[45] Here the respondent's statements to the alien witnesses of "Here comes the immigration." and "They busted us." were used against him. (Tr. 33, 70). The respondent was also cross-examined as to his Mexican money to show a nexus with Mexico, and the American money as the possible motive for his conduct. (Tr. 90). The stopping and interrogation of the vehicle respondent was driving clearly gave him standing to contest the fruits of that unlawful governmental intervention.

In *Weeks v. United States*, 232 U.S. 383 (1914), this Court erected a bar to the unlawful conduct of police

[43]The police officers initially questioned the occupants of a car *parked off the road* to see if they were lost. (No. 73-820, Appendix pp. 9-10).

[44]No. 73-820, Brief for Pet. 13.

[45]No. 73-820, Brief for Pet. 13-14.

officers engaged in invasions of privacy to insulate the judiciary from any participation, implied or otherwise, in the unconstitutional conduct of the Executive or his agents:

> "To sanction such proceedings would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action." 232 U.S. 383, 394.

A serious difficulty would arise if a fictional or arbitrary distinction were created and attempted so as to apply the exclusionary rule only where physical or tangible evidence (and not testimonial) was obtained as a result of police conduct in violation of the Fourth Amendment. What if government agents made an unlawful search and reviewed documents, but instead of photocopying them, merely had a skillful agent memorize them (possibly with the aid of notes). Then, at trial, when the records were shown to be unavailable, the testimony of the agent would be introduced as to the contents of the documents. This Court has already condemned such action in *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920), and there stated:

> "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court *but that it shall not be used at all.*" (Emphasis added).

A similar situation arose in *Nardone v. United States*, 308 U.S. 338 (1939), where the Government unsuccessfully contended they were free to make use of

evidence derived from unlawfully intercepted telephone conversations. In that case was born the concept "fruit of the poisonous tree." 308 U.S. 338, 341.

The more current authority of *Wong Sun v. United States*, 371 U.S. 471 (1963), is controlling. There this Court stated:

> "The exclusionary rule has traditionally barred from trial physical, tangible materials obtained either during or as a direct result of an unlawful invasion. It follows from our holding in *Silverman v. United States*, 365 U.S. 505, that the Fourth Amendment may protect against the overhearing of verbal statements as well as against the more traditional seizure of 'papers and effects.' Similarly, testimony as to matters observed during an unlawful invasion has been excluded in order to enforce the basic constitutional policies. *McGinnis v. United States*, 227 F.2d 598. Thus, verbal evidence which derives so immediately from an unlawful entry and an unauthorized arrest as the officers' action in the present case is no less the 'fruit' of official illegality than the more common tangible fruits of the unwarranted intrusion. See *Nueslein v. District of Columbia*, 115 F.2d 690. Nor do the policies underlying the exclusionary rule invite any logical distinction between physical and verbal evidence. Either in terms of deterring lawless conduct by federal officers, *Rea v. United States*, 350 U.S. 214, or of closing the doors of the federal courts to any use of evidence unconstitutionally obtained, *Elkins v. United States*, 364 U.S. 206, the danger in relaxing the exclusionary rules in the case of verbal evidence would seem too great to warrant introducing such a distinction." 371 U.S. 471, 485-486.

The Fourth Amendment clearly extends to oral statements of the defendant, *Katz v. United States*, 389 U.S. 347, 353 (1967).

The question of the standing of respondent should commence with an examination of the charges, 8 U.S.C. 1324(a)(2), for which the respondent was convicted. The illegal object, or contraband named in each count, was an illegal alien passenger in respondent's car. (C.R. 1-2). The concept of transportation includes possession or control so that the requisite possessory interest in the object of the offense is satisfied. If the respondent's car contained an unregistered firearm, a controlled substance, untaxed liquor, could the Government contend that respondent did not have standing? The stop and invasion of the respondent's automobile and these particular federal charges in which the seized and interrogated aliens were named, gave respondent standing. The decision in *Alderman v. United States*, 394 U.S. 165 (1969), offers further support for there the owner of the premises had standing to challenge the third-party conversations overheard by an invasion of his premises. Here, the invasion of the respondent's vehicle gave rise to the testimony of these witnesses against him. The words of Justice Clark, in another case where the Government contended that the respondent did not have the required standing, are apropos:

> "To hold that this search and seizure were lawful as to the respondent would permit a quibbling distinction to overturn a principle which was designed to protect a fundamental right."[46]

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[46] *United States v. Jeffers*, 342 U.S. 48, 52 (1951).

E. *Carroll* and its progeny, as well as established Ninth Circuit precedent, eliminate the issue of "retroactivity."[47]

Since *Carroll*, this Court has maintained an unbroken chain of precedent requiring probable cause to stop and search a moving vehicle, thus *Almeida-Sanchez* did not establish a "new rule."[48] In *Henry v. United States*, 361 U.S. 98 (1959), federal agents, having information amounting to "founded suspicion," but not probable cause, waved a car to a stop and were denied the fruits of that stop and search. Although the Government contends that the combination of *Camara* and *Terry* justify this roving patrol stop and interrogation, this Court has neither overruled nor deviated from the rule announced in *Carroll* and reiterated in subsequent cases.

Other related cases now before this Court involved a re-evaluation of 8 U.S.C. 1357(a)(3) by the Court of Appeals, but the Ninth Circuit in its first impression case involving 8 U.S.C. 1357(a)(1), relying on well-established circuit authority,[49] unanimously held that at least "founded suspicion" was required for this stop

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[47] If the issue of "retroactivity," or other arguments presented in Part I of the argument is decided against the respondent, the respondent would contend that Part II of the argument, *infra*, still presents an independent basis to support the reversal of his conviction by the Court of Appeals.

[48] Respondent would adopt and incorporate by reference *United States v. Ortiz*, No. 73-2050, Brief for Resp. 70-83.

[49] *United States v. Mallides*, 473 F.2d 859, 861 (9th Cir. 1973); *United States v. Ward*, 488 F.2d 162, 168-169 (9th Cir. 1973).

and interrogation. This case was controlled by pre-existing Supreme Court and Ninth Circuit authority.[50]

II.

THE FORCIBLE STOP AND INTERROGATION OF PERSONS TRAVELLING ON A HIGHWAY WHO APPEAR TO BE OF MEXICAN DESCENT WAS AN UNLAWFUL SEIZURE THAT CONSTITUTED INVIDIOUS DISCRIMINATION BASED ON RACE, ANCESTRY, OR NATIONAL ORIGIN WHICH REQUIRES THE SUPPRESSION OF THE RESULTANT EVIDENCE OR DISMISSAL OF THE CRIMINAL ACTION UNDER THE FOURTH AND FIFTH AMENDMENTS.

The Border Patrol agents candidly articulated their intention and purpose in forcibly stopping respondent's moving vehicle over sixty miles north of the border. The cross-examination of Border Patrol Agent Brady revealed:

> "Q. Did these people inside the car appear to be of Mexican descent to you?
> A. Yes, sir.
> Q. And that, if there was any, appeared to be the reason that you stopped them?
> A. Yes, sir." (A. 9).

[50]If warrantless stops are held unlawful, it is hoped this Court will follow the suggestion of the Government that the respondent should be given the benefit of the new rule. Brief for Pet. 9, n. 4.

Because the Court of Appeals held that the observation of the occupants as non-white or of Mexican descent did not constitute founded suspicion to justify the stop for illegal aliens, it did not have to reach the issue whether the Border Patrol agents have the authority to conduct such forcible stops of traffic for interrogation of persons as to possible alienage. Assuming such a power was found, the respondent would contend that the invidiously discriminatory manner in which it was exercised in the instant case requires either suppression of the resultant evidence or dismissal of the criminal charges against this defendant. The stop of the vehicle constituted a seizure of the vehicle in violation of the Fourth Amendment. *See Henry v. United states, supra.* However, this issue involving racial or ethnic discrimination rests more properly under the Fifth Amendment Due Process Clause. The Fifth Amendment contains no specific equal protection clause as the Fourteenth Amendment, but it forbids to federal authorities discrimination that is so unjustifiable as to be violative of due process. *Shapiro v. Thompson*, 394 U.S. 618, 641-642 (1969); *Schneider v. Rusk*, 377 U.S. 163, 168 (1964). This Court twenty years ago declared that the Constitution of the United States forbids discrimination by the Federal Government and its agents against an individual because of race. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

The right to travel on the highways unimpeded without interference from federal agents was recognized in a Fourth Amendment context in *Carroll v. United States*, 267 U.S. 132, 153-154 (1925), and repeated in

Almeida-Sanchez v. United States, 413 U.S. 266, 274-275 (1973). The right of free travel in the interior of the United States is fundamental and has roots over 100 years old. In the *Passenger Cases*, 48 U.S. 282, 492 (1849), Chief Justice Taney stated:

> "We are all citizens of the United States; and as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own states."

In *United States v. Guest*, 383 U.S. 745, 758 (1966), this Court held:

> "Although the Articles of Confederation provided that 'the people of each state shall have free ingress and regress to and from any other State,' that right finds no explicit mention in the Constitution. The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created. In any event, freedom to travel throughout the United States has long been recognized as a basic right under the Constitution."

This fundamental right of travel was again recognized in *Shapiro v. Thompson*, 394 U.S. 618, 641 (1969). Persons travelling in an automobile on the highway have inherent expectations of privacy—a right to be "left alone"—but if there is an intrusion that the travelling public may be forced to accept, such governmental action must be applied with an even hand. Invasion of privacy because a person appears to be of Mexican descent is not justified, and such an intrusion should not be tolerated by this Court. Persons appearing of

Mexican descent constitute an identifiable group or separate class so as to support a charge of invidious discrimination and are under the protection of equal protection or due process of the laws. *Hernandez v. Texas*, 347 U.S. 475, 479 (1954); *White v. Regester*, 412 U.S. 755, 767-770 (1973).

Assuming that the Government has discretion to stop without cause a vehicle and interrogate occupants under 8 U.S.C. 1357(a)(1) or (3), that power cannot be exercised to discriminate against persons appearing of Mexican descent.[51] The principle upon which respondent requests relief was stated long ago in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), where the Court held:

> "Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as to practically make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution." 118 U.S. 356, 373-374.

The petitioner in *Yick Wo* had been sentenced to jail for ten days by a police judges court for violation of a city ordinance. Although his writ of habeas corpus to the California Supreme Court was unsuccessful, this Court granted relief. There, the discrimination was on racial lines. Chinese had been denied applications to conduct a laundry business, while Caucasians had been

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[51] For the average person, this concept of appearance would be difficult to define. Physical characteristics might include dark skin and black hair, but there are persons in the Republic of Mexico who have fair skin and light hair.

granted the privilege. The law was neutral on its face, but was applied against those of Chinese ancestry. This Court held that the discretion of Government agents was limited by the principles of law. Government agents were subject to the law and were not permitted to deny one's liberty merely because they chose to do so.[52] The case antedating *Yick Wo* was *Chy Lung v. Freeman*, 92 U.S. 275 (1876), where the Court struck down the authority of a California Commissioner of Immigration empowered to go aboard ships and inspect foreigners for "lewd and debauched women." The Commissioner was to receive a fee for such examination and a fee for a bond. Although the statute was neutral on its face, it was applied to subjects of the Emperor of China. Justice Miller found the unfettered power of such an immigration inspector to be obnoxious, unlawful, and questioned how this law might be applied to subjects of other countries.[53] In *Hernandez v. Texas*,

[52]"But the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the commonwealth 'may be a government of laws and not of men.' For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself." *Yick Wo v. Hopkins*, 118 U.S. 356, 370.

[53]Justice Miller asked, "Or if this plaintiff and her 20 companions had been the subjects of the Queen of Great Britain, can anyone doubt that this matter would have been the subject of international inquiry, if not a claim of redress?" 92 U.S. 275,

supra, the Texas system of selecting grand and petit jurors by the use of the jury commissioners was fair on its face and capable of being utilized without discrimination, but relief was still available because the system was susceptible to abuse and was employed in a discriminatory manner. 347 U.S. 475, 478-479.

More recently in *Oyler v. Boles*, 368 U.S. 448 (1962), Justice Clark speaking for the Court stated:

> "Moreover, the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation. Even though the statistics in this case might imply a policy of selective enforcement, *it was not stated that the selection was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.*" 368 U.S. 448, 456 (Emphasis added).

Today, we look back with regret at the Governmental practices in the regulation and control of Chinese persons at the turn of the nineteenth century or those of Japanese ancestry during World War II. It is hoped that those who might be grouped as of apparent Mexican descent, illegal aliens, lawfully admitted permanent residents, Mexican aliens, and Mexican-Americans, and others who might have physical characteristics allegedly attributable to a person of Mexican descent, would not be singled out as the object of this Border Patrol stop and interrogation procedure.

279. What would our State Department do if the Border Patrol only stopped vehicles in which the occupants appeared of Russian or Slavic descent? How would our newly restored diplomacy with the People's Republic of China be affected if INS stopped only persons of Chinese descent?

Yick Wo serves as an example of discrimination against the Chinese laborer who sought to work in the laundry business. In *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943), this Court stated: "Distinctions between citizens solely based on their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."[54] The concurring opinion of Justice Murphy in that case has even greater application today:

> "Distinctions based on color and ancestry are utterly inconsistent with our traditions and ideals. They are at variance with the principles for which we are now waging war. We cannot close our eyes to the fact that for centuries the Old World has been torn by racial and religious conflicts and has suffered the worst kind of anguish because of inequality of treatment for different groups. There was one law for one and a different law for another. Nothing is written more firmly into our law than the compact of the Plymouth voyagers to have just and equal laws. To say that any group cannot be assimilated is to admit that the great American experiment has failed, that our way of life has failed when confronted with the normal attachment of certain groups to the land of their forefathers. As a nation we embrace many groups, some of them among the oldest settlements in our midst, which have isolated themselves for religious and cultural reasons." 320 U.S. 81, 110-111 (1943)[55]

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[54]Quoted in *Loving v. Virginia*, 388 U.S. 1, 11 (1967).

[55]The State of California was acquired after a war with Mexico, and since Mexico is contiguous to the United States, it is only natural that persons of Mexican descent or lawfully admitted resident Mexican aliens should reside in an area near their former familial roots.

In *Korematsu v. United States*, 323 U.S. 214 (1944), the defendant, an American citizen of Japanese ancestry, was convicted for remaining in a designated military area in San Leandro, California. Although the Court justified the action because of the military situation which was characterized as the "gravest eminent danger to public safety," it is doubtful that such racially oriented governmental actions could be justified today.

Even if the person is an alien, he is still protected by the Constitution of the United States. *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). This Court in recent years has held that aliens may not be denied welfare benefits, *Graham v. Richardson*, 403 U.S. 365 (1971), the opportunity to take competitive civil service positions, *Sugarman v. Dougall*, 413 U.S. 634 (1973), and the opportunity to practice law, *In re Griffiths*, 413 U.S. 717 (1973).[56] These cases highlight the fact that even a person *determined* to be an alien has protection, but in the instant case, prior to the Border Patrol agent stopping the car, their subjective determination was not that of *alienage* but the individuals appeared to be of Mexican descent. This important distinction was highlighted in the recent case of *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86 (1973). In that case a lawfully admitted resident alien from Mexico was not hired because she was an alien. This Court held that the employers discrimination was not because of her "national origin." 42 U.S.C. 2000e-2(a)(1). The company had in fact accepted

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[56]See also *Takahashi v. Fish Comm'n*, 334 U.S. 410 (1948).

persons of Mexican origin, and this Court held that this federal statute did protect aliens from unfair discrimination and that it would have been unlawful for an employer to discriminate against aliens because of race, color, religion, sex, or national origin—for example, by hiring aliens of Anglo-Saxon background, but refusing to hire those of Mexican or Spanish ancestry. 414 U.S. 86, 95. So also it would be invidious discrimination if Border Patrol agents were to stop only those who appeared to be of Mexican ancestry, but did not interfere with the right of travel of those who appeared to be of Anglo-Saxon background.

Under the principles of *Davis v. Mississippi*, 394 U.S. 721 (1969), the evidence adduced as as result of the stop of respondent's vehicle and interrogation of the occupants of that vehicle should be suppressed under the Fourth Amendment. *Yick Wo* obtained his freedom by writ of habeas corpus, and this Court ordered him discharged from custody and imprisonment. 118 U.S. 356, 374. This defense was also recognized in *Two Guys v. McGinley*, 366 U.S. 582, 588 (1961).[57]

Justice Murphy dissenting in *Korematsu v. United States*, *supra*, indicated that the evacuation was not so much due to a war time emergency but rather racial antagonism. He stated:

[57]This defense has also been recognized by the Courts of Appeals. See *United States v. Steele*, 461 F.2d 1148 (9th Cir. 1972); *United States v. Falk*, 479 F.2d 616 (7th Cir. 1973) (*en banc*); *United States v. Crowthers*, 456 F.2d 1074, 1080 (4th Cir. 1972); *Shock v. Tester*, 405 F.2d 852, (8th Cir. 1969); *Washington v. United States*, 401 F.2d 915, 924 (D.C. Cir. 1968).

> "The reasons appear, instead, to be largely an accumulation of much of the misinformation, half-truths, and insinuations that for years have been directed against Japanese Americans by people with racial and economic prejudices—the same people who have been among the foremost advocates of the evacuation." 323 U.S. 214, 239.

The institution by the Border Patrol of such racially oriented controls over Mexican and Mexican-Americans follows the perspicacious prediction of Justice Murphy:

> "To give constitutional sanction to that inference in this case, however well intentioned may have been the military command on the Pacific Coast, is to adopt one of the cruelest of the rationales used by our enemies to destroy the dignity of the individual and to encourage and open the door to discriminatory actions against other minority groups in the passions of tomorrow." 323 U.S. 214, 240.

Then it was a wartime emergency which ostensibly justified the action taken. The Border Patrol, which has many other procedures or methods to control illegal alien traffic,[58] should be affirmatively denied the racially discriminatory technique. Since respondent's vehicle was stopped by virtue of this unconstitutional discrimination, his conviction must be reversed and the charges ordered dismissed.

[58]Note 29, *supra*.

CONCLUSION

For the reasons set forth above, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

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v.

FELIX HUMBERTO BRIGNONI-PONCE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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As an alternate ground for affirming the judgment of the court of appeals, respondent argues (Br. 46-55) that the stop of his vehicle by Border Patrol agents was invidiously discriminatory in violation of the due process clause of the Fifth Amendment and that he is therefore entitled either to "suppression of the resultant evidence or dismissal of the criminal charges" against him (Br. 47).[1]

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[1]Insofar as respondent argues that the charges against him should be dismissed, the issue is not properly presented in this Court. The court of appeals held that the evidence derived from the stop of respondent's automobile should not have been admitted (A. 17), and it reversed and remanded the case in light of that holding (A. 18). The court's judgment did not direct that the charges against respondent be dismissed. Since respondent filed no cross-petition for a writ of certiorari, he may not now seek a modification of the judgment under review. See *Strunk* v. *United States*, 412 U.S. 434, 437; *Brennan* v. *Arnheim & Neely, Inc.*, 410 U.S. 512, 516; *National Labor Relations Board* v. *International Van Lines*, 409 U.S. 48, 52, n. 4. See also Stern, *When to Cross-Appeal or Cross-Petition—Certainty or Confusion?*, 87 Harv. L. Rev. 763 (1974).

Respondent does not attack any legislative classification. Nor, for purposes of this argument, does he dispute the authority of Border Patrol officers, consistent with the Fourth Amendment, "to stop without cause a vehicle and interrogate occupants under 8 U.S.C. 1357(a)(1) and (3)" (Br. 49). His claim, rather, is that the authority conferred by that Section "cannot be used to discriminate against persons appearing of Mexican descent" (*ibid.*). "[I]t would be invidious discrimination," he says, "if Border Patrol agents were to stop only those who appeared to be of Mexican ancestry, but did not interfere with the right to travel of those who appeared to be of Anglo-Saxon background" (Br. 54).

Respondent's contentions are wholly hypothetical, for there is not a shred of evidence in this record or in the record in *United States* v. *Ortiz,* No. 73-2050, to support a claim that Border Patrol officers "stop only those who appear to be of Mexican ancestry" or that they use their statutory authority "to discriminate against persons appearing of Mexican descent." As we show in our reply brief in *Ortiz,* the record there demonstrates that the national origin characteristics of a vehicle's occupants are not the basis upon which officers determine whether the vehicle should be stopped for purposes of inquiry. The characteristic appearance of Mexican *residents* is what the officers look for.

Respondent appears to rest his charge of invidiously discriminatory practices by the Border Patrol solely upon an agent's single affirmative response to defense counsel's questions on cross-examination in this case (A. 8-9):

> Q: Agent Brady, what was the reason you stopped the car?
>
> A: Routine immigration inspection.

> Q: You said there was nothing unusual about it, other than it was traveling north, is that correct?
>
> A: That's true.
>
> * * * *
>
> Q: Could you see the occupants of the car from your position on the roadway?
>
> A: Yes, sir.
>
> * * * *
>
> Q: Did these people inside the car appear to be of Mexican descent to you?
>
> A: Yes, sir.
>
> Q: And that, if there was any, appeared to be the reason you stopped them?
>
> A: Yes, sir.

There is nothing in the record to suggest that it was the agent's practice to stop all cars containing persons who appeared to be of Mexican descent or to stop only such cars. All that can be said is that the agent determined to stop *this* car to inquire as to the citizenship of the three occupants who appeared to be of Mexican descent.

The reasonableness of the agent's action should be viewed in light of the surrounding circumstances. As we showed in our opening brief (pp. 20-21, 30-31), Border Patrol Agents Brady and Harkins were observing traffic during the early evening hours on a highway frequently used to transport illegal entrants, at the site of the closed San Clemente checkpoint where more than 12,000 deportable aliens were apprehended in fiscal year 1973. Their patrol car was at a 90-degree angle to the highway, and their headlights were on. It is understandable, in those circumstances, that

a northbound vehicle carrying three persons of apparent Mexican descent might arouse the suspicions of the agents. Those suspicions in this case were borne out, for the agents discovered after stopping the car that the two passengers were illegal entrants and that the driver, respondent, was engaged in unlawfully transporting those aliens knowing them to be in this country illegally.

The officers' actions were not invidiously discriminatory. It is because racial or ethnic characteristics are in most circumstances irrelevant that discrimination on the basis of such characteristics is forbidden. *Hirabayashi* v. *United States,* 320 U.S. 81, 100. But we are dealing here with an immigration law enforcement problem of immense proportions, and nearly all the violators in the Mexican border area are illegal entrants from Mexico. Since the class of violators is composed of persons who are likely to appear to be of Mexican descent, it is not impermissible for law enforcement officers to take that fact into account in determining which persons should be asked about their citizenship. The situation here is analogous to that in which law enforcement officers are given descriptions of robbery suspects that include the suspects' race. Surely it would not be impermissible for the officers to limit their investigation to persons who fit the descriptions. Similarly, "common sense [dictates] that race may be a relevant factor in some circumstances in determining whether to question a person about his immigration status." *Hon Keung Kung* v. *District Director,* 356 F. Supp. 571, 575 (E.D. Mo); see also *United States* v. *Saldana,* 453 F.2d 352, 354 (C.A. 10).

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